THE

OFFICE and DUTY OF EXECUTORS:

Or, A *TREATISE* of

Wills and *Executors*, directed to *Teſtators*, in the choice of their *Executors*, and Contrivance of their *Wills*.

With direction for *Executors* in the Execution of their Office, according to the Law; and for Creditors in the recovery of their Debts.

With divers other particulars, very uſefull and profitable for all perſons, be they either *Executors*, *Creditors*, or *Debtors*.

Compiled out of the Body of the Common Law, by *THOMAS WENTWORTH*, late Bencher of *Lincoln's* Inn.

O

The Fifth Edition, Corrected and Amended. With an exact Table of the matters therein contained.

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The Preface.

AMidſt the Readers of theſe Diſcourſes; ſome not yet unfriendly may aske, perhaps, *Quorſum hæc*, or *Quorſum ſic?* Why have we a Tractate and Diſcourſe legal? or, Why in Engliſh, and not rather in the Law-language? To whom, yea, alſo to others, perhaps leſſe inquiſitive, it will be, as I think a thing not unpleaſing, to hear ſome reaſon rendred, why I have ſet my head and hands, to this worke ſo little in uſe with thoſe of our profeſſion; why alſo in Engliſh rather then in the language, wherein our volumes of Law are for the moſt part, and well-nigh wholly written.

Frſt, for the matter, *viz.* my thus Commenting or making a tractate upon a legall Theame.

1. I have longe and ſtrongly conceiued that the more Nobles, Gentlemen, and others, ſhall be acquainted with the Law of the Land, and the juſtneſſe, equity, prudence and prouidence thereof, the more they will loue it and affect it; *Ignoti nulla cupido*, the want of knowledge of it, cauſeth the leanneſs of loue to it. Therefore to bring Nobles and Gentlemen into acquaintance with the Law, is a means as well to aduance it in their eſtimation, as to advan-
2. tage them by it.

I haue long thought that we who are the Profeſſors of our Law, haue been more wanting to it, than the Ciuilians and Canoniſts to theirs; who haue written very many volumes: *Spartam quam nactus es, hanc exorna*, hath been ſaid of old, and
3. ſhould be aſſayed anew.

More wanting than others before us of our own Profeſſion haue we alſo been, as I think: yet, As of old *Britton*, *Glanvill*, *Bracton*, beſides not

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printed, *Fleta* and *Ingham*, did lead the way; so since, Master *Littleton*, and more lately, Sir *Germin Perkins*. *Fitzherbert*, *Stanford*, *Crompton*, *Lambert*, *Kitching*, Sir *Henry Finch*, *Dalton*, have trodden this path; so as it cannot be taxed with novelty or singularity. I mention not relaters or Reporters of Judgments and Resolutions, nor meer Abridgers, nor Authors of Bookes of Entries, expressing forms of Declarations and Pleadings, &c. Because these have trodden another, though for the Students and Professors of the Law, a very profitable path.

The tax and increpation of our late learned, and judicious Soveraigne, upon us the Professors of the English Law, as being wholly in effect addicted to our own private gaine and advantage, with neglect of the publike, had some strong operation upon me, howsoever upon others; setting for divers years past

4. King *Jam.* in his Preface to his Booke against Tobacco.

my pen on work, especially in Summer vacations, upon divers particular subjects, whereof this is one and the first-born.

5. To this I may adde the Crownes expectation of somewhat legal to be published and set forth from time to time, as appeares by the special Patents successively granted, and renewed for the sole Printing of Bookes of Law. There is one such in force at this present, and another long hath been in remainder and expectancie to take effect upon the exspiration thereof.

6. And now to adjoyne *Sic* to *Hæc*, *viz.* the reason of my English-writing, to that of my writing upon a Law-theme. First, receive the said late Kings judgment touching both, March 1609, expressed in one of his speeches printed. Thus I wish, saith he, the Law written in our vulgar language; For now it is an old mixt and corrupt language, only understood by Lawyers, *Not.* whereas every sub-

ſubject ought to underſtand the Law under which he lives, &c.

Herein, *Andrew Horn*, one ſometime of our Profeſſion, agreeth with the ſaid late King, ſaying, *Abuſio eſt que les leges ovesque lour encheſons, ne ſoient ſcæus & conus del touts*: It is an abuſe, ſaith he, that the Lawes with the grounds be not known by all. *Ergo*, to be in a tongue underſtood by all. 7. In his Mirrour of Juſtice.

More plainly and fully doth that our both well-learned and well-deſcended Sir *German*, ſing in conſort with our ſaid late ſcientious King. For he firſt brings in the Doctor of Divinitie, ſaying that henceforth he will take more paines than before he had done, to know the Lawes of England; for that knowledge is, *Multum neceſſaria & Clericis & Laicis, imo omnibus in hoc regno commorantibus, etiam in foro conſcientiæ*. And this being in his firſt Book written in Latin; after writing his ſecond Book in Engliſh, he expreſſeth 8. Lib. 1. c. 24.

seth that he so did for this reason, *viz.* To the end that it might be understood by all.

Which of us hath not heard it objected, that we the professors of the Law seeke to hide and secret the knowledge thereof under that dark and distasted language, wherein the Law is for the most part written; not that I hold it any just excuse for the nescience or negligence of any, that our books are not in English. Since, first, it were easie for any diligent & intelligent man, specially if acquainted with the right French Language, to understand our broken or brackish French in a few dayes. Secondly, there be both Statutes and some other law-books in English, which are neglected by the most. Thirdly, though care hath been taken in Parliament in *Edw.* the third's time, that Lawyers should plead, that is, argue & debat causes in English, which was often desired by the Nobles & Commons, till at last assented,

36. Ed. 3. cap. 15.

ſented and enacted; and in Q. *Maries* time care was taken, that the Commiſſions of Purveyours ſhould be in Engliſh, to the end that all ſubjects from or of whom they would take, might both ſee them to be perſons authoriſed, and ſo alſo in what manner they are directed to uſe their Authority, according to the Prince's pious and princely care that his ſubjects ſhould not be abuſed by his Officers: Yet for this Affaire, of having all the Law-volumes ſpeake Engliſh, I have not heard nor read of any deſire or endeavour in Parliament. Fourthly, If the Annals and Reports were in Engliſh, they are ſo replete with Debates about forms of Writs, Returnes, Pleadings, Eſſoygnes, Imparlances, Protections, Vouchers, Ayd-priors, and Counterpleas of both, and the like, as would eaſily diſtaſte and diſcourage any not intending to profeſſe and practiſe the Law, from verſing much in them, or paſſing through them. This 2 & 3. Ph. & Ma. c. 6. in fine.

there-

therefore, as I think, would not much effect the expreſſed deſire.

10. The thing (in my judgment) fit and fruitfull to produce that good effect, would be, To have Extracts of materials of Law; and that not without ſome good choice and ſelection, compoſed in way of Diſcourſe, or Tractate expoſitory, and that in Engliſh.

11. I cannot well ſee or comprehend how any one legall part or Theme may be more uſefull to and for the generality of men, and conſequently more generally expetible and wiſhed for, then the Office of Executors. For who almoſt is there, who either is not, or may not be an Executor or Adminiſtrator; or at leaſt hath not, or may not have, to do with them, either to receive from them, or to pay to them debts or legacies? Or, who is there above *Forma pauperis*, that may not be a teſtator, or Will-maker, to the guidance of whom, even in the choice of his executors, and contri-

vance

vance of his Will, it cannot but be material to know the office and duty, the right and intereſt, the power and authority of *Executors*; yea, of each one Executor, where there be divers; yea, to know who may be made an Executor, who not; who can make one, who not; how he may be faſhioned, generally or ſpecially; what ſhall come to him, what cannot be given from him; yea, what goods or Chattels ſhall go from him, though not given from him. Beſides, the knowledg for thoſe others neceſſary of the ſafeſt Wards or locks for Executors. Their *Scilla* and *Charybdis*, and the beſt advantage for Creditors, *&c.* towards or againſt them. To me, conſidering what parts of Law were moſt behoveful to be communicated to all willing Readers, none appeared which could challenge of this the precedence, and therefore I gave it the firſt and leading place. Thus mine own

thoughts.

thoughts. But how far this discourse may be profitable to any, and to how many, *aliorum sit judicium*. How many know no more of these, than of the way of a Ship upon the Sea?

Lastly, These are not intended for the Learned of our Profession, who have drawn, or can draw, out of the same Fountain which I did, and so need not my help; but for their sakes who are not professors of the Law: yet so, as if any young Students may in any part receive fruit by my labour, I shall not grudge or repine at their so doing. *Bonum quo communius, eo melius.*

The end of the Preface.

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THE OFFICE OF AN EXECUTOR.

THE things considerable touching Executors, may all, in effect, be reduced to these three Heads, *viz.* *Introduction.*

1. Their *Being.*
2. Their *Having.*
3. Their *Doing.*

By the first, I intend their Creation, or Constitution, with the incidents thereto. By the second, their interest, fruition, or possession. By the third, their managing and execution of their Office. This last was, and is the thing principally

in my intention, and chief aim of this Diſcourſe, but neceſſarily it muſt have ſome *Ingredients*, ſome *Concomitants*, and ſome *Conſequents*; as he that travelleth from *London* to *York* to ſpeak with *J. S.* muſt needs paſs by, and through other Towns and Villages, and ſpeak with divers other perſons in his Journey, and return. To come firſt to the firſt; therein we will conſider theſe ſix things.

CHAP. I.

1. *WHether an Executour and Will be ſuch relatives, that they cannot be without the other; and therein of the ſeveral kinds of Wills.*
2. *How and in what words an Executor may be made and created.*
3. *How he may be in ſpecial manner, different from the general, faſhioned, limited, or qualified.*
4. *Who may make, or be made an Executor, who not.*
5. *What one may give, or bequeath by Will, what not.*

6. *How*

6. *How a Will or Executour once made, may be unmade, and what shall amount thereto, viz. a Revocation total or partial; what to new publication.*

Of the Relation between a Will, and an Executor.

AS to the first; the very name of Executor purporteth in general one to execute somewhat, or to whom the execution of somewhat is committed or recommended: In one particular therefore, an Executor of a Will must needs be such a one to whom the execution and performance of another man's Will after his death is commended or committed. Or who is constituted or authorized by the Will-maker to do him that friendly office. Hence it followeth necessarily, that a Will is the onely Bed where an Executour can be begotten or conceived; for where

no Will is, there can be no Executor: and this is so conspicuous and evident to every low capacity, that it needs no proof or illustration. On the other side, though much may be written in the name of a Will, many Legacies bequeathed, and many things appointed to be done, yet if no Executor be named, there is no Will; for these two be so relative and reciprocal; as that one cannot be without the other; if no Will, no Executor; if no Executor, no Will. Yet here are two Cautions to be affixed: 1. That a man's Mind, Will, and Intent, touching the disposition of his goods, being declared, although for want of naming an Executor he die intestate, so as Administration is to be committed, yet for that here is not onely an inchoation, or inception of a Testament, but so far a progression therein, as *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of goods: therefore this mind and intention of the Intestate, being notified and made known to the Judge, who is to commit Administration, is usually annexed (as I take it) to the Letters of Administration; and meet so to be, for a direction, for, and to the Administrator,

Plow. Com. 185. in Wood. & Darcie's case, so expressly said.

Testamentum quasi testatio mentis.

miniſtrator; as well as to the Will fully and perfectly made, but refuſed to be proved by the Executor, which is uſual. Another Caution is, where a man ſeized of Land in Fee-ſimple, diſpoſeth the ſame, or part thereof, by his Will in writing; this ſtandeth good for the whole, or part, according to the difference of the tenure, although no Executor be named. So as the party dyeth inteſtate, and Adminiſtration is to be committed, as touching his goods; and yet hath a Will, as touching his Lands. This may ſeem ſtrange; but the reaſon thereof is an Act of Parliament, inabling to diſpoſe of Land by Will in writing; and for that, Land is not properly Teſtamentary; neither hath the Executor (if any be) any thing to do, or intermeddle therewith, and therefore is the making, or not making of an Executor, nothing pertinent to the validity, or invalidity of this deviſe, or diſpoſition of Lands by Will. So as though where there is not *Teſtatio mentis*, there is not *Teſtamentum*; yet may there be the firſt without the latter. Having now ſeen that Bequeſts of Legacies, without making of Executors, doth not amount to a Will: Let us now conſider, whether the ſole making of Executors, in the name of a Will,

without giving any Legacy, or appointing any thing to be done by Executours. Whether I say, this be, or amount unto a Will, or not, since here, upon the matter, nothing is willed, and consequently nothing rests to be executed by the Executours, whose office is, as hath been said, to execute the mind, will, and intent of their Testatour; and, *Ubi non est testatio mentis, non est Testamentum*, saith the Canonists. For answer hereunto, confessing that indeed to be the office of an Executor; I yet conceive confidently that in the cause above put, there is a good Will, and as a Will it is to be proved, and approved, for these reasons. First, for that the main part, and principal part of an Executours office, and that which concerns the soul of a Testator (as our Books speak) is the payment of his Debts; now who knows not that the very making of an Executour is the constituting of such a person who is to pay all Debts? and for that cause and end is principally to have and enjoy all the goods and chattels of the Testators, and all sums of money to him owing: so as the naming of *A.* and *B.* Executours, is by implication a gift or donation unto them of all the goods and

Sum. Silv. fol. 32. b.

and chattels, credits and personal estate of the Testatour, and the laying upon them an Obligation to pay all his Debts, and making them subject to every man's action for the same. And if the Law speak thus much, since *Quod necessario subintelligitur non deest*, what need then the party express it in his Will? If he had willed more then this, as to have given this or that in way of Legacy, it had been needful for him so to have set down in his Will, but there is no meer necessity that every man should give Legacies in his Will, the estates of many will not do more then pay their Debts, nor oftentimes do so much; so as if they should give any Legacies, it must be a dead, and a void gift. And suppose a man hath much more, and intendeth all to his Wife, Brother or Sister, or other Friend, his Debts being by such persons paid, since the very making of the party Executour without any more, amounteth to thus much; and effecteth this, what needeth then more words? *Frustra fit per plura quod fieri potest per pauciora*; as we often speak touching legal passages, it is needless to write four lines, where two be sufficient. Nor is *testatio*

mentis here wanting, since the Testator hath made known, who shall have the Administration of his goods for payment of his debts: and it is to be presumed, he had no more special Will, since he did not declare more, and left his Executors further to have and to do, *prout lex postulat*: And who can say, here is nothing to execute? Is the suing for, and collecting of Debts due to the Testator, and paying of Debts by him, nothing? Nay, it is, *in hoc negotio*, the *unum necessarium*. Besides, the making of an Executor is a designment of a person to be the Testator's Assign; to whom, and by whom, divers things may be feasible, by vertue of Covenants, Bonds, or other Assurances; as after, where we come to shew how the Executor represents the person of the Testator, will appear. Also of one, who, as our Books often speak, is to dispose the Testator's goods, for the best advantage of his soul; but instead of that, (since as the Tree falleth, so it will lye or rest) I will say, as is most for the honour and reputation of the Testator.

Of the kinds of Wills.

NOw Wills are of two kinds, or may be two ways made, *viz.* Either by writing, or nuncupative, that is, by words not put in writing, during the Teſtator's life; for after the Teſtator's death, this verbal Will muſt be reduced to writing, and have the Seal of the Ordinary, or Judge Spiritual, thereto affixed; and then it is as effectual, and of as good validity, as if it had been in writing in the Teſtator's life-time; and ſo doth the Common-Law allow and approve thereof.

4 Hen. 6. 10. E. 4. 1. If it be written; and brought to, & approved by the Teſtator in his life, it is a Will in writing.

14 H. 6. 5. vid. 5 H. 5. 1 M. 15. and *16 Eliz.*

But I adviſe all to make Wil by writing, and not to leave them to the doubtful fidelity, or ſlippery memory of Witneſſes. For as of Leaſes parol hath been ſaid, That they be Leaſes perjured, or of perjury: ſo of Wills parol may be feared. Beſides, many times a man doth ſpeak and declare this or that part of his *Will*, which his wife, child, or friend, diſſwading, he letteth that purpoſe and part of *Will* to fall, and departs from it: yet Witneſſes wiſhing it to ſtand, will perhaps affirm it as part of the *Will*. As for a Will-gift, and diſpoſition of Land of inheritance, if it be not fully written

written before the death of the Teſtatour, or done ſo far (at leaſt) as concerns the diſpoſition of Lands, it cannot be for that part made good by reducing it to writing after his death. As for goods and Chattels, it may: yet if it be written before the death of the Teſtatour, if it be never brought to him; or read to him after the writing thereof, it is good enough; and that not onely for Land, as the caſe reſolved in King *Edw.* 6. his time was, but alſo for goods and Chattels, ſo as there be an Executor named: But whether ſhall we ſay, this is a Will nuncupative or in writing? And ſurely, I think that this is a Will in writing, and not onely verbal, though it want ſubſcribing? for we know that many cannot write their names, but onely marks, and what is that? Nay, ſuppoſe one want hands, and cannot write ſo much as his name, yet doubtleſs this man may make a Will in writing, it being written by his direction, as his Will which he dictated; nor is the ſubſcribing of the name of the maker any eſſential part of a deed, much leſs of a Will, which needs not ſealing, as a Deed doth. Now put we the caſe on the other ſide, that many bequeſts, or Legacies be named

6 Ed. 6. Dyer 32.

named in a Will, and many things expreſſed to be done, and no Executor is named in the Writing, onely by word of mouth *A.* and *B.* be named Executors. This I think confidently is no Will in writing, but nuncupative onely, for that one eſſential part of the Will, *viz.* making of Executors is wanting in the writing. Nay, the pointing of him Executor, who is named in a Note left with *A. B.* is no ſufficient making of an Executor, ſaith the *Summiſt.* And of ſuch nuncupative Wills, Mr. *Perkins* reaſonably ſaith, that it properly hath place, when one ſuddenly taken with ſickneſs violent, dares not ſtay the writing of his Will, for fear of prevention by death; and therefore prays his Curate and others to witneſs what his Will is. To this Will, not written, there muſt be ſeven Witneſſes, and ſuch as come not by chance, but are eſpecially called for that purpoſe, ſaith the *Summiſt.*

Tit. de Teſt. Sum. ſilv. f. 443. b.

If he ſurvive and live a long time, not cauſing to be writ or atteſted by Witneſſes, may think it ſhould not ſtand as his Will.

Id. ſupra fo. 444. b.

What ſhall amount to a making one Executor, or what words are requiſite thereunto.

HAving before made to appear, that the being of an Executour, is an eſſential

ſential part of a Will, and ſo *de eſſe*, and not *de bene eſſe*, onely of a Will and Teſtament; let us now ſee, First, By what words an Executor may be made. Secondly, *De modo*, in what manner it may be done, how the power and authority of Executors may be limited and divided. As to the firſt; though one do expreſly by Will name or appoint any to be Executor; yet if by any word or circumlocution, he recommend or commit to one, or more, the charge and office which pertains to an Executor, it amounteth to as much, as the ordaining or conſtituting of him or them to be Executors: As if he declare by his Will, that *A. B.* ſhall have his goods after his death, to pay his debts, and otherwiſe to diſpoſe at his pleaſure, or to that effect; by this is *A. B.* made Executor, as was conceived by the Judges in the late Queen's time. And long before that, it was held, That if one do will onely, that *A. B.* ſhall have the Adminiſtration of goods, he is thereby made Executor: yea, in the ſaid late Queen's time, one giving divers Legacies, and then appointing that his Debts & Legacies being paid, his wife ſhold have the reſidue of his goods, ſo that ſhe put in ſecu-

If *A.B.* be made Executor, and to him and *D.* ſome goods are deviſed to be diſpoſed for his ſoul, *D.* is by this an Executor for theſe.

39 *H.6.Dy.* 29 0.
M.15. & 16 *Eliz.*
21 *H.6.6,7.*

ſecurity for the performance of his Will; by this, without more, was ſhe an Executour, as was held by three Juſtices. (*Viz.*) *Manwood*, *Harper*, and *Mounſon*, in the Lord *Dyer*'s abſence. And ſo alſo where an Infant was made Executor, and *A.* and *B.* Overſeers, with this condition, That they ſhould have the rule and diſpoſition of his goods, and payment and receipt of Debts, unto the full age of the Infant; by this were they held to be Executors in the mean time. And if *A.* be made Executor, and the Teſtator after, in his Will, expreſſeth that *B.* ſhall adminiſter alſo with him, and in aid of him; here *B.* is an Executor, as well as *A.* and if *A.* refuſe, *B.* alone may prove the Will as Executor, notwithſtanding it be onely ſaid, he ſhall adminiſter with *A.* and in aid of him. Thus many ways, and by divers words of implication, one may be made Executor, al hough not expreſly ſo named by the Will. But if *A.* be made an Executor, and *B.* a Co-adjutor, without more, he is not by this an Executor with *A.* as in K. *H.* 6. his time was held; nor hath ſuch Co-adjutor, or Overſeer, any power to Adminiſter, or intermeddle, otherwiſe then to counſel, perſwade, and adviſe; yet

21 H.6,6. 24 Ed.3. F.Exec.121. 29 Ed.3.39. yet I think he may, and in Conſcience ſhould ſo do. And if that will not prevail to rectifie negligence, or miſcarryings in Executors, he ſhall well perform the truſt repoſed in him, if he complain in the Spiritual Court, or Court of Conſcience; and it is reaſon, I think, that ſo doing upon juſt cauſe, his charges be born out of the Teſtator's eſtate, or the Executor's purſe, who otherwiſe would not be reformed.

How an Executor, or his Executorſhip, may be limited or qualified in ſpecial manner, different from the general.

NOw let us ſee how this making of an Executor may be ſpecially qualified; and firſt, the time may be limited, when he ſhall firſt begin to be Executor; and that either certainly, or with ſome contingency. Secondly, the creation may be conditional. Thirdly, it may be partial; or dividedly, and not intirely.

As to the firſt, one may appoint *J. S.* to be his Executour a year or more time after his death; this is good.

So

So alſo if *A.* appoint *B.* his Son to be his Executor, when he ſhall come to full age; and in the mean time he dieth inteſtate. Again, one may appoint the Executor of *A.* to be his Executor: and then if he die before *A.* he is inteſtate until *A.* die. This creation may alſo be conditional, and the condition may either be precedent or ſubſequent. In the time of King *H.6.* one did name *A.* and *B.* his Executors, and if they would not take it upon them, then *C.* and *D.* ſhould be his Executors, and then there *A.* and *B.* refuſed, and the queſtion was, whether in Suit againſt the Debtors of the Teſtator, *A.* and *B.* ſhould joyn with *C.* and *D.* as where four Executors being named, and two refuſe, and the other two prove the Will, yet all four muſt be named in Suit againſt the Teſtators Debtors, as was there admitted: but in the principal Caſe it was reſolved, That the Suit ſhould be onely in the name of *C.* and *D.* for that the appointment of them Executors, if *A.* and *B.* did refuſe, did imply, that then they onely ſhould be Executors. And here all four were never made, nor intended to be Executors, but *A.* and *B.* upon a condition ſubſequent

Vide Groſbrook & Fox. Plowd. *A.* and *B.* made Executors, but not *B.* to intermeddle during the life of *A.* and good. 32 *H.8. Bre.* 155.

3 *H.6.* fo.6.

sequent, that they should not refuse: and *C.* and *D.* upon a condition precedent, *viz.* if *A.* and *B.* did refuse. It is usual to make one, or more Executors; conditionally, that they put in security to pay Legacies, or, in general, to perform the Will; nor was it ever doubted, as I think, but that this was good: yet I should advise, that such condition be plainly thus expressed, *viz.* either thus; that if *J.S.* do put in security, &c. by such a day, that then he shall be Executor, else not: Or thus, *viz.* to make him Executor conditionally, that before he do administer (Funeral perhaps excepted) he shall put in such security; else, perhaps, he being Executor, till the Condition broken, in that mean time he may have disposed of all, or most part of the Testator's estate. In the late Queen's time, there was a Case remarkable to this purpose: One Willed, that if his wife suffered *J.S.* to enjoy Black-Acre (being belike part of a Joynture) for three years, then she should be his Executor, or else *A. B.* should: and the question was in the *Common-Pleas*, Whether presently, before the end of the three years, she were Executor; or not, till she suffered,

P. 23 Eliz. *Alice Francis her Case.*

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the Land to be enjoyed three years; and it was held by all the Judges, but the Lord *Anderſon*, that ſhe was preſently Executor, until ſhe ſhould diſturb *J.S.* &c. For upon that done, it was agreed, that the Executorſhip would, by vertue of the Condition, be transferred from the wife to *A. B.* But now during theſe three years, might ſhe have diſpoſed of all the goods of her husband; yea, within one of theſe three years, and leſs time, and then have broken the Condition, and have left to *A. B.* a dry Executorſhip.

Now to the third Point, one may divide his Executor's power three ways, *viz.* Really, Locally, or Temporally. Really thus; He may make *A.* his Executor for his Plate, and Houſhold-ſtuff; *B.* for his Sheep and Cattel; *C.* for his Leaſes, and States, by extent; *D.* for his Debts due unto him; and ſo divide the Power and Adminiſtration of his Executors at his pleaſure. He may divide them alſo, or their power Locally, *viz.* *A.* for his goods in *Com. Buck.* *B.* for thoſe in *Com. Oxon.* and *C.* for thoſe in *Com. Berk.* He may alſo divide them in time; *viz.* his wife, or any other perſon to be Executor, during her life, or during the minority

19 *H.* 8 3. 19 *H* 8 *Dy.* 4 *Hill* 33 *Eliz. in Com.* b.

32 *H.* 8 *Bro.* 115.

nority of his Son, or so long as she continues Widow, and after his Son to be Executor. So of like limitations or divisions, either for time, place, or things, wherewith they shall intermeddle. Nay doubtless, one may be made Executor for one particular thing onely, as touching such a Statute, or Bond, and no more; and thereof good use may be made, as I think thus. Many have Bonds, Statutes, and Recognizances, for warranty, or enjoying of Land, or freeing, or saving harmless from incumbrances, in general, or particular. Now he which hath these, selling the Land, may by Letter of Attorny, lawfully assign them to the party who buyeth the Land or Lease: but this notwithstanding, the interest remains in him who selleth, and by his Outlawry, they may be forfeited, or by him released, any Bond to the contrary notwithstanding; and if he die, the interest in Law will be in, and go to his Executors, and in their names onely Suit or Execution may be had and maintained.

Quer. If not *Assets* in Law, when obtained.

Now then, if the Vendor, besides assignment, make, as to the Statute, Recognizance, or Obligation, onely the Vendee Executor: By this the interest, after death

death of the party, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quær.* If the Vendee, his Heirs and Assigns, may be made Executors, so as that security shall go to them one after another, without renewed making of Executors. Thus if the party make no other Executor, he dyeth Intestate, as to the rest of his estate; and as to this specialty onely shall have an Executor, and must have a Will proved: And in case he do make another Will for his estate residue, there must be two Wills proved. But in the other case, where by one onely Will, one is Executor, for one part of the estate, and another for another, there being but one Will to be proved, one proving of it sufficeth. And though in the premises of a Will two be made Executors joyntly and equally; yet there may be a *Proviso*, that one shall not meddle, during the others life, so as they shall be Executors successively, and not jointly: And thus also to other purposes aforesaid, a subsequent Cause of *Proviso*, may make the partition and division of authority. But if the *Proviso* or

32 *H.* 8. *Bro. Exec.* 55.

clauſe ſubſequent, be meerly contrary to the premiſes, it will be void: as where two were made Executors, with a *Proviſo*, or Clauſe, that one of them ſhould not Adminiſter his goods. This was held void for repugnancy, by *Brudnel*, and *Engleſield*, Juſtices. But *Fitzherbert*, Juſtice, was of mind, that it was not void, nor utterly repugnant: For the other might joyn in Suits, though not adminiſter. And Juſtice *Shelly* was of a third opinion, different from all the reſt, *viz.* That here was a repugnancy; but the laſt Clauſe ſhould control the Premiſes; and ſo this one onely ſhould be Executor.

19 H. 8. Dy 3, 4

Who may make an Executor.

SOme perſons may be unable to make Wills, and conſequently Executors; for that is all one: whoſoever may make a Will, may make an Executor. There be nineteen ſeveral kinds of perſons unable, as the *Canoniſts* ſay, to make Wills; but with many of them, we will not intermeddle, becauſe we find no mention of them in our Law. The perſons principally, and moſt uſefully to be conſider'd of by us, are either the defective in underſtanding,

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as Infants, Idiots, Lunaticks, and the like: or defective in power, or intereſt; as women-covert, or married; perſons outlawed, attainted, convict; or excommunicate. Some touch we will give of others; as Aliens, Corporations, Villains, Monks, and Fryers. As for infants and women covert, becauſe much is to be ſaid of each of them, and their Adminiſtrations, we will forbear to treat of them in this place; but after, will do it of each ſeverally.

To begin with an Idiot; naturally he is not able to make a Will, as was reſolved in the Spiritual Court; becauſe he wants the uſe of Reaſon, to conceive what it is fit for him to will; nor doth the Common-Law oppoſe this, as I think. 3 *Eliz. D.* 203, 204.

A Lunatick, having *Lucida intervalla*, that is, ſome ſeaſons of enjoying his right mind, and freedom from his Lunacy, may in thoſe times of his right mind make a Will & Executors, elſe not; for even one by age or ſickneſs, becomn of *non ſanæ memoriæ*, is unable to diſpoſe of lands or goods.

One deaf and dumb born, may make a Grant, ſaith Mr. *Perk.* if he have underſtanding, which is hard, as he confeſſeth, conſequently much more a Will; but in the time of King *Hen.* 8. it is left a *Vide plus la Perk.* 5. 6. 33 *H.* 8. *Dy.* 55, 56. *Vide* 26 *Ed.* 3. 63. *Lib. Intr.* 396.

18 Ed. 3. 53. 26 Ed. 3. 63. So in effect. 44 Ass. p. 30. P. 31. Eliz. Pascatia de Fountain's Case.

demurrer, whether a Deed by such, be good or not. If but mute, he may wage his Law, and attorn by signs, and so perhaps by signs declare his Will. 44 *Ass.* p. 36.

An Alien may make, or be an Executor, so as he be not an Alien enemy, for such cannot sue, as in the late Queen's time was held: but there the doubt was, whether a Subject of *Spain* were at that time to be held an enemy, no war being proclaimed between the Kingdomes, though hostility exercised.

As for persons Attainted, Convicted, or Out-lawed, it will be said, that these can have no goods of their own, and consequently, they can make no Wills, nor Executors; and it is not to be denyed, that we find it pleaded sometimes by Executors, that their Testators stood out-lawed. But first it is clear, that all and every of these may have goods as Executors to others, which neither are forfeited by Attainder, or Outlawry, nor divested by marriage or Villeinage. Therefore, as touching them; they may make Testaments. And that all these sorts of persons may be Executors, is also evident. So also touching Villains, Monks, and Fryers,

Fryers, who can have no goods to their own uſes. And that one attainted of Felony, may have an Executor, appears by the Caſe in the late Queen's time wherein it was long debated, Whether ſuch an Executor might maintain a Writ of Error, or not, to reverſe the Attainder of the Teſtator. And as for other Out-lawries, the Plea thereof by the Executors, that their Teſtator was, and dyed out-lawed, proves not a nullity of the Will, or Executorſhip: for then they might have pleaded, that they were never Executors. But it tends to this, that no goods did, or could come to them for ſatisfaction of the Debts, by reaſon of Out-lawry; yet it hath been delivered, not of old onely in many Books, but by ſome of late, that Debts upon Contract, where the Defendant may wage his Law, are not forfeited by Out-lawry, not uncertain Damages for Treſpaſs in Battery, or falſe Impriſonment, &c. *Quar.* Of breach of Covenant. But goods taken away by a Treſpaſſer, may yet be forfeited by the Attainder or Out-lawry of him from whom they were taken; for that the property in right ſtill appertained to him, and he might have taken

29 *Aſſ.* P. 63. 49. Ed. 3. 5. 50. *Aſſ.* P. 15. 33 *H.* 6. 27 9 *Eliz.* D. 28. 2. *Contra.* *Co. lib.* 4. fo. 95. 19 *H.* 6. 47. 30. *Ed.* 3. 4. 16 *Ed.* 4. 7. 5 *Ed.* 3. 53. 6 *H.* 7.

them again whereſoever he found them; therefore the Action for this ſhall not come to his Executor, but for the other not forfeited, it may.

15 H.7.fo.7 Whether an excommunicated perſon be able to make a Will, or not, may be ſome doubt, ſince *Keble* denyeth him ability to preſent to a Church; and in the very point Summ. Silv. t.t. Teſtam. antiently, the opinion of *Canoniſts* hath been Negative, but more lately grew Affirmative.

Who may be Executor, more.

42 E. 3.1. AN excommunicate perſon cannot ſue; that is, proceed in Suit as Executor till he be abſolved; there being danger of Excommunication to all that converſe with him; but this makes not a nullity of his Executorſhip, nor overthrows the Suit, but ſtays it onely from proceeding, until abſolution. As for perſons attainted, or outlawed, we have before ſpoken affirmatively, in way of proof, that they may make Executors, for continuation of the Executorſhip; ſo of Aliens, and others before. Recuſants convicted at the time of the death of any Teſtator, are diſabled to be his Executors.

21 H. 6 30. A Clark attaint may be an Executor by-paſt. Juſt. Peſcat. de Fountain But an Alien Enemy cannot ſue as Executor. P. Eliz. 3 Jac. cap. 5. Whether Corporations, compound,

or

or consisting of divers persons, may be made Executors, or not; I doubt. First, because they cannot be Feoffees in trust to others use. Secondly, they are a body framed for a special purpose. Thirdly, they cannot come to prove a Will; or, at least, to take an oath as others do.

What a man may give, or dispose, by his Will.

HAving considered of the makers of Executors by Will, and of them so made; Let us now consider, what by this Will may be disposed, given, or bequeathed, And first, he who himself is an Executor, cannot by his Will give or bequeath to any other the Goods, Chattels, or Credits, he hath as Executor, the property not being altered; for that he hath not them properly as his own, or to his own use: onely he may make a continuation of the Executorship', and his Executor shall have them as Executor to the first Testator, as was resolved by the Judges of both Benches, in the late Queen's time. And if he be Administrator, the Bequest is then also void, nor then will they go to his Executor, but to a new Administrator; but on his death-

Bransby Vers. Grantham. Plow. Com. f. 525.

Hill. 29. Eliz.

Death-bed; he may give them by Word or Deed, though not by Will. Next, if a man have Debts owing to him, as many have much, it is considerable, whether by way of Bequest in his Will, he can give away these to any from his Executors. And doubtless, he cannot effectually in Law; they being not subject to Assignment unto any, except the King. So as, if he give such a Debt to *A.* and such to *B.* yet must the Suit for them be in the name of the Executor; and so also, the Release, or Acquittance for them; and not in their names, to whom the Bequest is. But when they be received, if there be no Debts to pay, the Executor ought to deliver them to the party, to whom the Bequest is, and thereunto may be compelled in Court of Conscience, or in the Spiritual Court. Therefore the Case of the bequeathing money payable upon a Mortgage, is in this manner to be understood to be good, and not otherwise, as I take it. He that is jointly, with any other, estated in Lands or Goods, can give no part by his Will, but all will survive: but by Act, in his life, he may dispose of his part; and the Assignee may dispose of his moiety by Will; yea, though it

At any time in his life, he may alter the property.

So 48 E. 3. *fol.* 14, 15. Where the Bequest was to one of the Executors, it was held, that the other Executor might release it.

If sufficient, otherwise to pay all one, as if none.

48 *E.* 3. p. 14, 15. 11 *Ed.* 3. *Fitz. Tit. Cond.* 9. Where both stated jointly by one Grant.

Differences between joint Tenants, and Tenants in common, holding by several Grants.

it be half an Horſe or Oxe, that cannot be divided. So of a Leaſe of Lands, or Tythes, or Grant of Goods to two, *Habendum*; one moiety to the one, and the other moiety to the other; each may give his moiety by Will. But if one be poſſeſſed, or eſtated for years, by Leaſe, Wardſhip, or Extent, &c. in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will, give or bequeath any of theſe; but notwithſtanding, they will remain unto his Wife, upon his death: but yet his gift, or Grant of them, taking effect, in his life-time, would bind his wife, and carry away the intereſt from her. If one be Tenant for the lives of one, or more, others (as oft-times, men take Leaſes for lives of younger perſons than themſelves) this cannot be by Will diſpoſed of; for that it is no Chattel, nor is it within the Statutes of Wills, for that it is no ſtate of Inheritance. Therefore, let the party look to convey it in his life-time, leſt it go to an Occupant, *viz.* him who firſt ſhall enter. If it be an eſtate in Land, he muſt either make Livery, have a Bargain and Sale inrolled, or Covenant to ſtand ſeized, to the uſe of his Wife, or ſome of his

Another kind of Tenants in Common.

his bloud, or make a Leaſe for years, determinable upon thoſe lives: Good it be by bargain, and ſale for years, if the thing be in Leaſe; that ſo without Inrollment, or Atturnment, the Rent may paſs, elſe a bargain and ſale may be made for a moneth, or ſuch like time; and then a Releaſe or Grant of the Reverſion, in ſtead of Livery and Seiſin. But if a man have a Leaſe for never ſo many years, determinable upon life, or lives; that is, if ſuch or ſuch live ſo long (which unskilled perſons call a Leaſe for lives) this State may well enough be given, and diſpoſed by Will, becauſe it is but a Chattel. If a man ſeized in Fee, or in Tail of Land, having Corn growing upon it, and by his Will do give the Corn, and die before ſeverance, this is a good Bequeſt; becauſe, the Corn ſhould have gone to the Executor. So it is alſo of a Parſon, touching his Glebe, and a man ſeized in the right of his wife, or his own right but for life. But as for Trees growing upon the ground; theſe can no otherwiſe be given by Will, then as the Land it ſelf, upon which they grow, may be given; of which matter, as not pertaining to the Office of Executors, *viz.* How, and in what manner, Lands may be given by Will

Stat. Merton, cap. 2. Viduæ poſſunt Legare tam de dotibus, quam de aliis, &c.

Quær. If the trees may be deviſed by the Statute of Wills, without giving the Land it ſelf.

Will, I intend not to treat in these Discourses.

Of the Revocation, and Countermand of Wills, and new Publication.

HAving considered of the making of Wills and Executors, let us before we come to the *Probat*, consider of Revocation; for that may take away the force of a Will rightly made. A Will therefore having two parts, *viz.* *Inception*, which is the making; and *Consummation*, which is the death of the Testator, or maker of the Will, there is power in him at any time before death, to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new Publications, or Re-affirmance of Wills, in whole, or in part. As therefore a Will may be made by word; so also may a Will made in writing be by word revoked, or disanulled; for since every making of a later Will is a Countermand and suppression of the former Will; and since a Will may be made *Nuncupatively*, or by word, and so

Omne testamentum morte consummatur. See the pleading of it by making a later Will. *Lib. Intra.* f. 323. *b.* & 641. *a.*

ſo by making a verbal Will, one may revoke a written Will. It will thereupon follow, that one; by Word, may expreſs the alteration of his Mind thus far, that the Will by him formerly made, ſhall not ſtand, but be revoked, and annulled; and this will ſtand, and be effectual; ſo as if he after die, without making any new Will, or new Publication, or Re-affirmance of the former, he dyeth inteſtate, or without Will. As a Will may be wholly revoked; ſo alſo in part. Hereabout, a good reſolution was in a *Kentiſh* Caſe, where one *Ryete* by his Will, in writing, did give ſome Gavel-kind Land to one *Harriſon* and five days before his death, ſaid, in the preſence of Witneſſes, that this gift ſhould not ſtand, and that he would alter it, when he came home; deſiring them to bear witneſs of his Revocation. Now before he came home, he was killed by the ſaid *Harriſon*, who cauſed the Will in writing to be proved; and after he was attainted and hanged for the murther; and his Son, by the Cuſtome of *Kent*, (*viz.* the Father to the Bough, and the Son to the Plough) entred into the Land; and this manner of Revocation, by word

14 *Eliz.* *Dy.* 310. *b.*

onely

onely was held ſufficient; although the Will, in writing, were not cancelled, nor defaced. And the like Reſolution, for verbal Revocation, is implyed in the Caſe of *Forſe*, and *Hembling*; where it being reſolved, that a *Feme* Covert, or married woman, by word Countermanding, and Revoking her Will formerly made, when ſhe was a ſole, or unmarried woman; this was not effectual, nor of force, by reaſon of her Coverture, taking away the freedom of her Will. Hereby it is implyed, that another who hath freedom of Will, may, by word, ſufficiently revoke a Will in writing; and ſo was it ſince alſo admitted in the Caſe between Sir *Edward Mountague*, and *Jeoffries*, touching the Will of Sir *Jo. Jeoffries*: but there a difference was conceived, betwixt ſaying, *I will revoke my Will* (which onely expreſſed a purpoſe, or intent, and therefore was no preſent Revocation;) and ſaying, *I do revoke it*, *or*, *It ſhall not ſtand*, *or*, *My Heir ſhall have my Land*; which croſſed the gift of it by the Will. And as Wills may be wholly, or in part, revoked; ſo may alſo the Executorſhip of one, or more, of the Executors, and yet the Will may ſtand in all the other parts

M. 28. & 29 *Eliz. Co. lib.* 4. *fol.* 60.

7 *H.* 6. *fo.* 13. M. 38, 39. *Eliz.*

parts, ſo as there be any one Executor, or more, unrevoked; but if all be revoked, then the whole Will is revoked, becauſe no Will can ſtand without Executors: and this Revocation may be by word onely, without being expreſſed in the will, or any other writing. But I would wiſh all to expreſs ſuch Revocation in the foot of the Will, or that the name or names of the Executor, or Executors, ſo revoked, be expunged, or blotted out of the Will; and that this be done in the preſence of ſome Witneſſes, to teſtifie the act, and intent of the Teſtator.

Again, Revocations may be by act in Law, as well as in fact, or by direct and expreſs terms; as in the ſaid Caſe of *Mountague*, and *Jeoffryes*, where Land being deviſed by Will, and the Deviſor after making a Feoffment, though there were ſome defect in the Livery, to make it effectual; or if he made a bargain and ſale, that was never inrolled, or granted, the Reverſion, but no Atturnment had, ſo as the Land paſſed not; yet in all theſe Caſes the Will or Gift of Land ſtood revoked: But in caſe he had onely covenanted, that he would have made ſuch an eſtate, and not done it; this was held,

Vide 6. E. 6. *Dy.* 74. & 3. & 47. & *Ma.* 43. 2.

to

to be no Revocation. And so by some, in case he do but make a Lease, leaving the Fee-simple as it was: But of this, *Quære*; And if a difference may not be betwixt making a Lease for years, and a Lease for life, which altereth the Free-hold. If a Lease for twenty years be bequeathed to *J. S.* and after the Testator maketh a Lease for fifteen years, reserving a Rent, I take this to be no Revocation of the Bequest; but if the Testator after this Will made, take a new Lease for a longer term; so as the former Lease is surrendred in Fact, or in Law; this must needs be a Revocation of the Bequest, or at least an Adnullation thereof; and that although the Bequest were generally of his Lease, not mentioning the number of years: for this which he now hath, is another Lease, and not that which he had at the time of the making of the Will. So, if one give his black Gelding by Will, and after, before his death, he selleth, or giveth away that Horse, and buyeth another black one, this new gotten Horse shall not pass by the Will, because it was not the Testators at the time of making his Will. So also, if the Crop in the Barn be bequea-

thed in *October*, and the party lives till that time twelve month, having ſold that Crop, and Inned a new; this later Crop ſhall not paſs by the Will, and the former cannot.

Again, as Revocation may be by alteration of the ſtate of the Deviſor, in the Land Deviſed; ſo may it alſo be by Alteration, in ſome caſe, of the ſtate or quality of the perſon of the Deviſor. As if a woman ſole make a Will, and after take a husband, this without any more; as is reſolved in the ſaid Caſe of *Forſe* and *Hembling*, doth work a Revocation, or Adnullation of the Will: for that elſe it ſhould be irrecoverable, ſince ſhe having loſt the freedom of her Will, cannot actually and directly make a Revocation, as we before have ſhewed. But notwithſtanding her Will be revoked; yet in caſe her husband before or after marriage with her, were bound or covenanted to perform this woman's Will, if he ſo do not, by payment of the Legacies therein bequeathed, his Bond or Covenant will ſtand good, and be ſuitable againſt him; as was adjudged touching the Will of *Elizabeth Smaleman*, marryed after her Will made to one *Wood*, who firſt was bound to perform it. Yet another Caſe there is

M. 25, 26 Eliz.

of

of alteration in the ſtate of the Teſtator's perſon, which makes no Revocation of his Will. As if he being of ſound mind and ability, make a Will, and after becometh frantick. In this Caſe, this is no Revocation: So as his Will ſtands till his death irrevocable, if he recover not. Now of a Will revoked, there may be a Reviver by a new Publication; and thereof, now.

Of new Publications.

HAving ſhewed how a Will may be revoked, and ſo loſe its force; let us now ſee how without making a new Will, that ſo revoked, may be revived, and ſet on foot again. And that is divers ways: As firſt, by a *Codicil* annexed after thereunto; as was reſolved between *Betford*, and *Barnecot*, in the *King's-Bench*. Secondly, by adding any thing to the Will, or making a new Executor. Thirdly, by expreſs ſpeech, or word, that it ſhould ſtand, or be his Will, as I conceive, to have been the better opinion, in the ſaid Caſe of *Monntague*, and *Jeoffry's*; wherein yet was much difference of Opinion, both touching

M. 38. 29 Eliz. in ba. reg.

Revocation and new Publication. If a man having made a former Will, do make
44 *Ass. p.* 36. a latter, which is more then a bare Revocation: yet if afterward lying upon his death-bed, and speechless; both these Wills be delivered into his hand, and he required to deliver to one of his Friends about him, that Will which he would have to stand, and to keep in his hands the other; he thereupon delivereth to the Minister, or other his Neighbours, the first made Will, retaining in
44 Ed. 3. fol. 33. his hands the later, as was done in the time of *Edward* the third; here the former Will, though made void many years before by the later, is revived, and shall stand as the Partie's Will. But now put the case, that a Bequest, at the first, is void; yet by publication after, it may be good; as if one give to *Sarah* his Wife a piece of Plate, or other thing, and hath no such Wife at the time, but after marryeth one of that name, and then publisheth his Will again; now this shall be a good Bequest. So if one Devise Lands or Goods, which one hath not; If he after do purchase the same, and then say, that his Will before made shall stand, or be his Will, It shall

be

be a good Will, and Bequeſt; for this, in effect, is a new making. And though moſt of the precedent Caſes be of Revocation of particular parts of the Will, and not of the total: Yet firſt, Be it conſidered, that that part ſo revoked, was, in effect, the ſubſtance of the Wills: Next, it is eaſily diſcerned, that if one part be revocable, ſo is another alſo. And thus Revocation may ſpread it ſelf over the whole: Nay, doubtleſs, the whole, *Uno flatu*, may be revoked, as well as by parts; even as a Faggot may be put wholly into the fire, as well as ſtick by ſtick. And as the *Velleities*, or diſpoſing parts of the Will, are revocable, and revivable, by new Publication as aforeſaid; ſo is alſo the conſtitution of Executors. As if one of the Executors names be ſtricken out, and afterwards a *Stet* be written over his head by the Teſtator, or by his appointment, now is he a revived Executor. So if the Teſtator expreſs by word, in the preſence of Witneſſes, that the party put out, ſhall yet be Executor; but now I mean, where the Executor's name is not ſo blotted out, but that it may be read and diſcerned; 3 & 4 P. M. Dy. 143.

for else the *Stet* is upon nothing; and if the Verbal re-affirmance should renew his Executorship, then must the Will be partly in writing, and partly *Nuncupative*, his name not being to be found in the written Will.

CHAP. II.

Of the state of things instantly upon the Testator's Death, before any Will proved.

Here we will consider these several things.

1. *What is wrought by a gift of a thing certain and known; as the white Horse, the red Cow, &c.*
2. *What by a Bequest to an Executor.*
3. *What wrought by a Release in the Will, to a Debtor.*
4. *What by making a Debtor, or Creditor, an Executor.*

AS touching the first, *viz.* the Bequest of a Chattel, real or personal, which the

the Testator had in possession: notwithstanding, that if the said Testator had by his Deed or writing, or but by word on his death-bed, or before, given these his goods, and died before they had been taken, he to whom they so were given, might have taken them; yet in this case of gift by Will; neither can the Legatee, *viz.* he to whom they are bequeathed, either take them, or recover them from the Executor; or a stranger taking them by any suit at the Law, for that he hath no property in them; yea, if the Bequest be to himself who is made Executor, be it of Lease, Plate, Cattel, &c. They shall not vest nor settle in him as Legatee, but as Executor, until express, or implyed election: but he is to have and take the same by way of Legacy. And the reason in both Cases, is this, *viz.* That the Law prefers debts, and the satisfaction of them before Legacies, and ties Executors also to that rule; and therefore will transfer nothing from, or out of the Executor, till he having considered of the state of the debts to be paid, & goods, out of which the same are to be paid, shall find that safely this or that Legacy may take effect, without making any defect in payment of Debts, or drawing

1 & 2 P. & Ma. Dy. 110 a. & 139. b. vide Co. 8. f. 95. & 96.

Of the second. See *Co. 10. f. 47. & 52.* So resolved *Pas. Trin. 37. Elt.* in *b. a* M onely *Gaw. contra Portman. Pl & Simes deft.* See more of this *Tit.* Legacy; and of the assent of one Executor only.

upon him, and his own goods, any Damage, or loss, as a Waster: and thereupon shall assent to such Legacy. Thus now is the Law taken; but heretofore some Opinion hath run otherwise, *viz.* That he to whom any Bequest was made of a thing known and certain, might take it without any assent of the Executor; and that when to the Executor himself any Goods or Cattel, movable or immovable, was bequeathed, in case there were otherwise sufficient goods, for satisfaction of debts, the same should instantly upon the Testator's death, without any Act or Election by the Executor, be transferred into, and unto him in his own right, as a Legacy, and not remain in him as Executor. As for sums of money bequeathed, or so much in Plate or Rings, it is evident, that they must be had by the delivery of the Executor: Yet hath the Legatee such an interest before delivery, as that dying before payment, it will not go to his Executors. But, as I take it, no such person, to whom any thing certain is given by Will, can make any Gift or Grant of it, before the Executor have assented to his having thereof: Nor, perhaps, will the Executors assent, after the Grant

27 H. 6. 8. Of late, perhaps, some single, or sudden opinions, may also have run that way, but in *Portman's* Case, the Point was divers times argued, and then adjudged as before.

To be bought.

Grant, have ſuch relation, as to make good the Grant precedent; Why ſo yet, more then an Attornment of a Leſſee, which is a like Aſſent to the Grant of another? And, *Quære*, if by the Outlawry of the Legatee, before the Executor's Aſſent, this thing bequeathed be forfeited.

Quære, Of this, ſee more after *Tit.* Legacy, thereabout.

If without juſt cauſe, an Executor will refuſe to aſſent, he is compellable by Law Spiritual, or Court of Conſcience; yet if Spiritual Court preſs to do, where is juſt cauſe to ſtay, a *Prohibit* lyeth, *ut credo*; for ſince Executors ſtand liable to recovery of debts againſt them by Common-Law, it is reaſon that Law enable them, to keep wherewith to pay. And here yet note ſome ſeeming oppoſition in the Law; for where before great difference was ſhewed between a Deviſe or Bequeſt, and a Gift or Alienation executed in ones life-time: Yet the Lord *Dyer* reports it, to be reſolved, That where a Leaſe for years was made upon condition, that the Leſſee ſhould not alien in his life-time, that yet a Bequeſt of this Leaſe by his Will, was a breach of the Condition, as being an alienation in his life-time.

3. Of a diſcharge by Will to a Debtor, ſome queſtion may be, Whether to per-

perfect, and make good this; so as the Debtor may plead it in Bar, there be not requisite, as in the former, an assent of the Executor. On the one side, since this giving, is a forgiving; for he to whom it is bequeathed, cannot otherwise have it, then by way of Retainer; it may probably be said, that here needs no such assent of the Executors, as in the Case where any thing is to be transferred; for here is rather an extinguishment, and an exoneration, then a passage of a Chattel, by way of *Donation*. On the other side, it is probable, that it being but a Bequest, and so a Legacy, since Debts are in Law and Conscience to be satisfied, before any Legacies, that therefore the Executor having not sufficient otherwise to satisfie his Testator's debts, may sue for this debt, and refuse to suffer it to pass away as a Legacy. And to this opinion do I encline, as best for Creditors; and satisfaction of Debts is by Law respected, as an act greatly concerning the Testator's soul. But some will, perhaps, make a contrary doubt, that although there be an assent of the Executors to this discharge; yet it will not amount to a legal Release; for that a Debt, at least, if it be by Specialty,

cannot

cannot be releaſed, but by Deed, and a Will is no Deed; for a Seal is not neceſſary thereunto, though it be fit and convenient; whereto I give this Anſwer, that a Will, though it be not properly and legally a Deed; for it may be good enough without a Seal, which is an eſſential part of a Deed; yet hath it the force and effect of a Deed: for as a Releaſe cannot be made but by Deed; ſo neither can an Eſtate or Intereſt, though but for years, in Tithes, Advowſons, Commons, Fairs, and like things, be granted or aſſigned, otherwiſe then by Deed; yet it is clear, that ſuch a ſtate for years, in any of theſe, may be given by Will, as well as a Leaſe of Land, which proves a Will to have the force and effect of a Deed.

Not *de eſſe*, but *de bene eſſe*.

Of making a Debtor, or Creditor, Executor: and firſt of the Debtor made Executor.

SUppoſe we then, that *A.* and *B.* being made Executors, the Teſtator was indebted to *A.* twenty pounds, and *B.* was indebted to the Teſtator twenty pounds, how do things ſtand preſently upon death? First, it is clear, that the Debt of *B.* to

11 *H.* 7. 31. *Plow. Com.* 185. *contr. Danby & Chake*, 8 *E.* 4. 3.

B. to the Teſtator, ſtands in Law extinct; this making of him Executor, being a Releaſe in Law.

And may be granted, that he ſhould account before the Ordinary for it.

Therefore let Creditors take heed of making their Debtors Executors. And yet doubtleſs (me thinks) ſuch a Debtor made Executor, ſhould hold himſelf reſtrained in Conſcience, from taking benefit thereof, if (the debt remitted) there ſhall want to ſatisfie either Debt or Legacy of the Teſtator. And I doubt, Whether a Court of Conſcience may not juſtly ſo order, the Teſtator being perhaps ignorant of this point in Law, that this Debt ſhould be releaſed, by making the Debtor Executor.

Yet it ſeems *Plowd.* 186. *a.* The Law was taken to be *ut ſupra.* 8 h. 4.

Though he never adminiſter. 21 E. 4. 3. 31. 11 H. 6. 38.

And what is ſpoken of making the Debtor Executor, generally the ſame is to be underſtood of making any one of the Debtors Executor, where there be many joynt Debtors: and ſo although where many Executors be made, and but one of them is Debtor to the Teſtator; for they cannot ſue without making him who is the debtor alſo a plaintiff, which he cannot do againſt himſelf. The like Law, touching Actions of Treſpaſs, or Account: Yet of old, where one made his Bayliff one of his Executors; together with *A.* and *B.* who brought

2 R. 3. 20. *Per Stanley,* & 22. *per Vavaſor.*

9 H. 5. 13. Leſt a Demurrer in Treſpaſs by all, againſt the Executor, who was Treſpaſſor.

brought an Action of Account againſt the Bayliff in their two names onely; Juſtice *Herle* held the Action well brought: This was in the beginning of King *Edward* the third his time; but the contrary hath been ſince reſolved. Some alſo have held, That though in the life of this Executor, who was a Debtor, he could not be ſued: yet after his death, the ſurviving Executors might ſue his Executor. But that cannot be, as I take it; for that the debt was utterly extinct, by the making of him Executor, as if the Teſtator had releaſed it to him; yea, though his Executor died before he did ever adminiſter, or prove the Will. And like extinguiſhment of the debt, if the Creditor marry with one of the Executors of the debtor: yet was there an Action of debt maintained *temp. Ed.* 3. by the Huſband and Wife, againſt the Husband; and other Executors, upon an Obligation by the Teſtator to the Wife, before her marriage. But if a debtor take Adminiſtration of the goods of his Creditor; this, methinks, ſhould not diſcharge him, but that his debt ſhould ſtand as *Aſſets* in his hand, becauſe the Inteſtate did no act to free him from the debt.

3 E. 3. 23.
6 H. 4. 3.
8 E. 4. 3. *Cook.*
21 H. 7. 31.
20 E. 4. 17.
21 E. 4. 3. 61.
Plowd. Com. 36.
Plowd. Com. 185.
11 H. 4. f. 83, 84.
31 E. 3. *Fitz.* Ex. 82.

The

The Debtor or Creditor made Executor.

THis making of the Debtee Executor, and so the party, who both should pay, and be paid, the Debt; giveth him clearly power to pay himself before any other, if his Debt be by Specialty, or upon Record. Nay, some have held, that so much of the goods of the Testator shall be altered in property out of the Executor, as Executor, into him as Creditor; but how that can be, I cannot see: For whether it shall be satisfied out of the Leases and Chattels, real or personal, whether out of the Corn in the Barns, Cattel in the Fields, Plate, or Houshold-stuff; quis, till some election made by this Debtee Executor, cannot be known, nor shall be effected by any operation of Law, preventing the Executors election, in taking his satisfaction, where, and how he will. For certainly, as an Executor hath election to pay which Creditor he will first; so hath he election to pay and satisfie himself, by what part of the Testator's goods he will; yet, perhaps, if there be ready money in the Executor's hands, there shall be an alteration

Plow. Com. 185. By all the Judges; but *Brook*, Chief Just. *Plow.* 185. b. Where the goods be of more value, which shall be scattered?

See *Plow. Com.* 544. the like of a Legacy of 20 l. given to the Executor.

Or if the goods amount in all to no more then this Debt.

teration of the property of ſo much thereof, as was owing by the Teſtator to the Executor. And if there come not to the hands of ſuch Executor, ſufficient to pay himſelf, he may have an Action of Debt againſt the other Executors, or the Heir, as by ſome hath been conceived: Yet let it be well adviſed of, whether, if he do Adminiſter at all; and ſpecially, if he pay himſelf any part; he have not thereby barred or diſabled his Suit for the Reſidue. But if he refuſe to Adminiſter at all, it were very unreaſonable, that he ſhould not be able to ſue the other Executors; for ſo a Debtor might by ſubtilty make his Creditor an Executor with others, and take a courſe that his goods ſhould come onely into the hands of thoſe others; ſo as the Creditor could not pay himſelf; and conſequently, if he could not ſue the other Executors, he ſhould thus be ſtripped of his Debt by a ſleight. *Quare*, If he may bring the Action in the name of the other Executors, onely the Will being proved in his name, as well as in the names of the reſt; or whether the Action ſhall be brought in his name alſo, and then he be ſevered at his own prayer. But againſt the Heir, there is

See Plow. Com. 185. 13 H. 8. 15. 11 H. 4. 83. 12 H. 4. 22. 20 E. 4. 17. 21 E. 4. 3.

Nov. 184. b. & 185. b. He is barred; for he cannot apportion his Debt.

none

none to joyn with him; and him may he sue, if he have not Administred as Executor; this admitted, that the Bond extend to the Heir, which without expres words it doth not, though for the Executor it be otherwise.

12 H. 4, 21. He may sue the Heir, if the Heir be bound, and he have not sufficient goods, as Executor.

Thus having considered of the state of things before, and without any Will proved, or other act done by Executors; we should now come to the point of the proof; but two things, pertinent to it, are in order precedent.

CHAP. III.

1. *What may be done by, or to an Executor, before proving of the Will.*
2. *Of refusal, and the things incident thereunto.*

Before Probate, *what may be done by, or to Executors.*

AS to this, it is clear, that before proving of a Will by the Executor, he may seize and take into his hands any of the goods of the Testator; yea, enter into

into the house of the Heir (if not locked) so to do, and to take the specialties of debts; and generally he may do all things which to the Office of an Executor pertaineth (except only bringing of Actions, and prosecution of Suits.) He may pay debts, receive debts, make Acquittances, and Releases of Debts, due to the Testator, and take Leases or Acquittance of debts owing by the Testator: yea, if before such proving, the day occur for payment, upon Bond made by, or to the Testator, payment must be made to, or by this Executor, though *no* will be proved, upon like pain of forfeiture, as if the Will were proved. Also, an Executor may before *Probate*, sell or give away any of the goods or cattels of the Testator. And whereas the Assent of an Executor is necessary to the setling and execution of a Legacy as before hath bin shewed. So as if one give me his white Horse, or black Cow, by Will, or any other well known thing, I cannot, after his death, take it, though I come where it is, but am punishable by Action of Trespass, at the Executor s Suit, if he do not assent: yet an *Executor*, before the Will proved, may give his Assent, and it will stand good. Yea, although

9 E. 4. f. 12. 47. 7 H. 4. 18. They cannot sue, till they have the Will under the Seal of the Ordinary.

Wray. 23 El.

he die after any of these acts done, the Will being never proved by him; yet do these Acts so done, stand firm and good, as I take it. Yet (as I find) an Executor, making his Will, and dying before he had proved the Will of his Testator, his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were, after debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testator's goods, with the Will annexed; as by Doctor *Drury* was in the late Queen's time declared to be the Law, and course of the Court Spiritual, to which credit was given by the Judges of our Law, and the Court of *Star-Chamber*: for though the Book do not mention it to have been in *Star-Chamber*, it is else-where so reported: Yea, an Executor, for goods of the Testator taken from him, or a Trespass done upon the Lease-Land, or a Distraining, or Impounding of Goods, or Cattel, may maintain, before the Will be proved, Actions of Trespass, or *Replevin*, or *Detinue*; for these Actions arise upon the Executor's own Possession.

22 & 23 E. *Dy.* 372.

Dy. in Plow. Com. 281. Case of *Groisbrook* & *Fox.*

But

But before the proving of a Will, an Executor cannot maintain a Suit, or Action of Debt, or the like. And the reason is; for that therein he muſt ſhew forth the Will proved, under the Seal of the Ordinary. And ſo, as I take it, muſt it be, if he bring any Action for treſpaſs done, or goods taken in the Teſtator's life-time; ſo as the Teſtator himſelf was intituled to the Action, and it grows not upon the Executors poſſeſſion. I find that an Executor granting the next avoidance of a Church, which to him came from the Teſtator; the Grantee maintained a *Quare Impedit*, without ſhewing forth the Will: But the Executor himſelf might ſo have done, as of his own Poſſeſſion before the Will proved, and ſo without ſhewing it under the Seal of the Spiritual Court, as well as Actions of Treſpaſs, or *Replevin*; for goods taken after the death of the Teſtator: yet in the principal Caſe of *Greyſbrook* and *Fox*, which was an Action of *Detinue* by the Executor, for goods taken or detained after the Teſtator's death, the Plaintiff did ſhew forth the Will proved. But that proves not any neceſſity thereof; or that, if the Will had not been

34 P. & M. *Dy.* 135. a. *Dy. in Plow. Com.* 281. a.

Plow. Com. 275. b.

proved, it could be no hurt to ſhew it forth, ſo upon his own Contract for the Teſtator's goods, as if the Executor ſell Cattel, or other goods of the Teſtator before the Will proved, he may for the money payable, maintain an Action for debt, before he have proved any Will: and in this, and the Action of Treſpaſs, there is no neceſſity of naming him Executor. Alſo, on the other ſide, an Executor may well enough be ſued for debts of the Teſtator, before the Will be proved; for he may not by his own Act of delaying the *Probate* of the Will, keep off Suits, except he will refuſe in due manner, that ſo Adminiſtration being granted, there may be ſome body ſuable by the Teſtator's Creditors, for debts by him owing. And the uſual Plea of the Defendant, to eſtrange himſelf from the Teſtament, is to ſay, that he neither is Executor, nor hath Adminiſtred as Executor. So as if he either be Executor *De jure*, or *De facto*, by his own Act of Adminiſtring, it ſufficeth.

Of refusal to prove the Will, and therein of Administration, fore-cluding Refusal.

NOw touching this other point, fit to be thought of, before we meddle with the *Probate, viz.* Refusal to prove; we will thereabout consider these several parts, *viz.* First, how, and in what manner Refusal may, or must be. Secondly, in what Cases, or in respect of what Acts one named Executor, hath lost, or determined his election of Refusal, or Acceptance. Thirdly, of what effect and operation the Refusal is; what difference, where all the Executors refuse, and where but some, or one of them. Fourthly, what relation it hath.

Now touching the first: the Ordinary, before committing Administration, where a Will is made, and Executors named, if he know of it, must send out Process against the Executors, to come in, and prove it; and if they do not come, they are to be excommunicate. But if they do come, if they, nor any of them, will prove, by reason of such Refusal, the Ordinary may commit Administration; perhaps also, they may be appointed Executors at a time future, and not presently.

3 H. 7. 14.

9 Ed. 4. 47. 3 Hen. 7. 14. *Plow. Com.* 281.

Now refusal cannot be verbally, or by word; but it must be by some Act entred or recorded in the Spiritual Court, and therefore must be done before some Judge Spiritual, and not before Neighbours in the Countrey; for that is not effectual. Yet Sir *Ralph Rowlet*, making the Lord Keeper *Bacon*, *Catlin* Chief-Justice, and the Master of the Rolls, Executors; they wrote a Letter to the Ordinary, that they could not attend the Executorship, and therefore wished him to commit Administration, who did so; making every of their Refusals to be recorded, and this was held good. So as a Lease being by that Will bequeathed to *Catlin*; and he, after this refusal entring and assigning it to one, and the Administrator assigning it to another; it came in question between them, Whether had best right; and judgment was given for the Assignee of the Administrator, against *Catlins* Assignee; whereas, if the Refusal had been void, *Catlin* had continued Executor, and so his Title had been better. For, in case the Ordinary himself be made Executor, there (saith the Book) he may refuse, before his Commissary; and so was it there pleaded for the Arch-Bishop of *Canterbury*, who was made Executor to Sir *Will. Oldhalle*.

9 *Ed.* 4. 33. See *Pl.* 154. a If Debtee made Executor, sue the Ordinary for the Debt; this amounts to a refusal of the Executorship.

M. 28 & 29 *Eli. Inter Brooker & Carter, in ba. com.*

9 *Ed.* 4 33. The Book calls him Cardinal of *Canterbury*.

What

What ſhall be ſuch a medling, or Adminiſtring by an Executor, that he cannot refuſe after.

AS to the ſecond, where an Executor hath Adminiſtred, he cannot afterwards refuſe, becauſe he hath already accepted of the Executorſhip, and ſo determined his election: at leaſt, the Ordinary ought not to accept of ſuch refuſal, but ſhould compel him to take upon him the Executorſhip; as the Law was taken both in the time of *Ed.* 4. and of Queen *Elizabeth*: Yet if the Ordinary do admit one to refuſe, notwithſtanding that he have Adminiſtred: this ſtandeth good, as it ſeemeth, conceived by the Judges, in the time of *Henry* 6. For there the Executor commanded one to take goods of the Teſtator, out of the hands of *J. S.* who did accordingly, and afterward the Executor refuſed before the Ordinary, and Adminiſtration was committed to the ſaid *J. S.* who brought an Action of Treſpaſs againſt the party ſo taking the goods from him, and there

9 Ed. 4. 47. Selling Land as Executor, is Admin. *Dyer* in Caſe of *Greisbrook* & *Fox. Pl. Com.* 280. b. *Paſ.* 7. *Eliz.* 36 *Hen.* 6. f. 7, 8.

the Refusal, and committing Administration were admitted to be good: so perhaps, *Factum valet, quod fieri non debuit.* And it well may be, that the Ordinary did not know of the Executors such intermedling at the time, when he did admit of his Refusal. After Refusal, and Administration committed, the Executor cannot go back to prove the Will, and assume the Executorship: but if onely upon the Executor's making default, to come in upon Process, to prove the Will, the Administration be committed; here the *Executor* may yet, at any time after, come and prove the Will, and so undo the Administration; as was in the late Queens time resolved between *Bale* and *Baxter*.

Mich. 27. & 28 El. z.

But what if after Refusal, it shall appear to the Ordinary, that the *Executor* hath Administred before his Refusal; so as had it been then known, the Ordinary should not have admitted him to refuse; Whether now may he revoke his Administration (for it is revokeable) and inforce the *Executor* to proceed to proving of the Will? And surely, me thinks, he may; for that the *Executor* by Administring had determined his election, and accepted the office of Executorship;

Boxel's Case in *Com. Ban.*

now

now he cannot, both accept and refuse. Besides, we know, that Creditors may maintain their Suits against him, having once Administred; the Common-Plea to free himself, and shew that he is not the party suable for the Testator's debt, being, that he neither is *Executor*, nor ever did Administer as *Executor*; wherefore he having administred, it will be found against him. Now it is not Congruous, that in the *Spiritual* Court there should be no *Executor*; and yet in the Courts of *Westminster*, there should be an *Executor*. But since this point of Administring is so material, to the point of being admitted, or not admitted to refuse, we will here consider, in this place, briefly what shall be said to be an Administration by an *Executor*, determining his *election*, and disabling his refusal, and what not.

1. Some will, perhaps, conceive, that the act of the *Executor*, in the fore-mention'd Case, where he onely commanded *J. S.* to take goods of the Testators out of a strangers hands, was no Administration; & it is true, that in that Book it is passed in silence, and not expresly said to be an Administration. But the L. *Dyer*, in the Case of *Greisbrook* and *Fox*, speaking of that Case

A. being Executor, did administer, and yet would not prove the Will. *B.* took Administration; and being sued for debt, did plead the matter *supra*, and was held a good Plea; and it was found for him before. Just. *Dothoridge ad Ox. in a Stat.* 2. *Carol. Reg.*

32 H. 6. 7.

Case, saith expresly, that the Ordinary might there have rejected the Executor's refusal; for, saith he, when the Executor had once intermedled; he should not have been suffered to refuse; so as he doth clearly admit, that to have been an Administration. And elsewhere it is held, That if an Executor take goods of the Testator, and convert them to his own use, this is an Administration; yea, if he do but take them into his hands, say some, without converting of them: If the Wife take more Apparel of her own then is necessary, this is an Administration, as the Book admits: but if by the assent, or delivery of the Executor, it is not. More clearly, if one do either pay debts of the Testator, or receive debts, or make Acquittances for them, or demand the Testators debts as Executor; or give away goods, which were the Testators, or deliver money of the Testators for Fees, about proving the Will. All these be full and clear Administrations, as Executor. But saith *Fitzherbert*, if he onely lay out his own money for Fees, this is no Administration; so saith *Frowick*, If he pay Debts with his own money; and if he do it about the Funerals. But some difference may

20 Ed. 4. 17. & 21 E. 4. 5.

21 Ed. 4. 5. 21 H. 6. 19. 20. 33 H. 6. 31. 8. 1 El. Dy. 166 13 Ed. 3. Exec. 91. 3. 4. Ma. Dy. 1. 35. 26 H. 8. 7, 8. 20 H. 7 Kelw. 63. 21 Ed. 4, 5. 20 H. 7. f. 5. a.

may be between Acts done by one named Executor, and by a ſtranger, *viz.* to make him an Executor of his own wrong; whereof we ſhall ſpeak after, not in this place. If one being ſued as Executor, take it upon him, and plead in Bar as an Executor; this is an Adminiſtration. *9 Ed.4. 12, 13. 33 H.6. 31. a.*

Of the force and effect of Refuſal.

AS to the third Point, *viz.* The force, or effect of Refuſal. First, it is clear that if there be but one Executor, and he do refuſe, or being many, if they do all refuſe, then is the party dead Inteſtate, and Adminiſtration is to be committed with the Will annexed, as is before ſaid; nor can any after meddle as Executors. But in caſe there be divers Executors, *viz.* *A. B.* and *C.* and *A.* onely refuſeth, and the Will is proved by the others, there *A.* continueth Executor, notwithſtanding his refuſal; ſo as he ſtill may releaſe Debts of the Teſtator, and Debts owing by the Teſtator may be releaſed to him; yea, if Suit be to be had by, or againſt the Executors, it ſhall not be in the name of *B.* and *C.* onely; but *A.* alſo muſt be named as a Plaintiff, or Defendant, *Cook l. 5. f. 28 Cont. 18 E. 2. Bro. 8. 37.* *22 Ed. 3. 19. 15 Ed. 3. Exec. 8. 41 Ed. 3. f. 22. 21 Ed. 4. f. 24.*

fendant, else the Action may be overthrown. For the Will being proved, all the *Executors* therein named, stand and continue *Executors*, notwithstanding any of their Refusal; as it was resolved in the latter end of the late Queens time, according to divers former Resolutions. And therefore this *Executor* which hath refused, may afterwards administer at his pleasure, and intermeddle with the goods as well as the others: yet, saith *Brook*, Chief-Justice, after the death of his Companion, he cannot so do; but then the *Executor* of him who proved, is onely to administer, *Quod non est Lex*. There may be some difference between Suits by *Executors*, and Suits against *Exeeutors*; for when they themselves sue, they being privy to the Will, and having the custody of it, must bring their Action in the name of all the *Executors*, according to the Will; but he that is to bring an Action against them, need not, perhaps, take notice of more *Executors*, then those that have proved the Will, or otherwise do administer: for it is no good Plea for themselves, in an Action against them, to say there is another *Executor*, without saying also that he hath administred, as it seemeth

42 El. Co. 9. fol. 36, 37.

4 and 5 Ph. & Ma *Dyer*, 169. c. 6. *contra* 21 E. 4, 23, 24.

eth by divers Books. Nay, one Book in the time of *Henry* 8. goeth further, *viz.* That if the Suit be brought againſt all; yet one of them not intermedling with the proving of the Will, may plead, that he was never *Executor*, nor adminiſtred as *Executor*. By this it ſhould ſeem, that *Executors* refuſing (I mean all of them, ſo as no Will is proved) they in an Action againſt them, may ſay, that they were never *Executors*; but, me thinks, they ſhould not ſo plead, but ſhew the ſpecial matter, as was done in the time of *Edward* the fourth.

33 H. 6. 38. a Co. 9. 37. 6 32 H. 6. 25. 27 H. 8. 11. *per totam curiam.*

As for relation, I will forbear to ſpeak, till I come to proving; for that *Probate*, and Refuſal, ſtand in the ſame ſtate, as touching Relation.

9 Ed. 4. 33. Co. 9. f. 36.

CHAP. IV.

Of proving Wills.

NOw let us ſee, touching the *Probate* of Wills, what is conſiderable; and therein, of theſe three or four parts;

1. *Where, and before whom, and how the proof muſt be.*

2. *What*

2. *What ſhall be* Bona notabilia, *to intitle to* Probate.

3. *What force or validity, either a right or erroneous* Probate *hath.*

4. *What relation either* Probate, *or* Refuſal, *hath.*

As touching the firſt Point, *viz.* How, and where, and before whom, Wills are to be proved, briefly thus;

The proving is in the Spiritual Court: yet in ſome Mannors, by Preſcription, Wills are to be proved before the Steward, though no Lands thereby paſs, as appears by divers Books: and in the Mannor of *Maunsfield* is this Preſcription; and in others, whereof *Tremaile* was Steward in King *Richard* the third his time, as he declared. And the like I may tell of my own knowledge, touching the Mannors of *Cowly* and *Caverſham*, in the County of *Oxford*, where I have kept the Courts for the Lord Vicount *Wallingford*, and found it in preſent, and frequent uſe. And it is ſaid by the Judges, in the time of King *H.* 7. That this proving of Wills in the Court Spiritual, is not antient, but of later time. Yea, it is acknowledged by *Linwood*, the Dean of the Arches, that it pertains not to the Spiritual Court of common right; nor

2 R. 3. *Fitz.* Co. lib. 9. fol. 43.

11 H. 7. 12.

is

is ſo in uſe in other Kingdoms. The reaſon why the Law of *England* hath herein given way to the Ordinary, a nd Court Spiritual, is ſaid by *Walſh* in *Greisbrook* and *Foxes* Caſe, to be the piety and integrity, which is preſumed to be in thoſe of that Function, having charge of ſouls. Indeed they are, as it ſeems to me, Executors of the New Teſtament, or laſt Will and Teſtament of Jeſus Chriſt; whereby great Legacies and Gifts are given to men, and by Paſtors to be diſpenſed and diſtributed: of which Diſtributers, it is required, as St. *Paul* ſaith, *That they be found Faithful.* And happy are they, who with him can plead, *Plenè Adminiſtravit, viz.* That they have fully Adminiſtred, as he did; much depending thereupon, *viz.* God's honour, the bleſſing, proſperity, and ſafety of the Country, the Pie y, Juſtice, Conſcience, Contentation, and Salvation of men. As for Wills proved in *London* and *Oxford*, before the Major, that is, onely in reſpect of the Burgages within thoſe places deviſable; but they were to be proved alſo before the Ordinaries, in reſpect of the goods, and there onely where no Lands are bequeathed.

Plow. Com. 279.

1 Cor. 4. 2. Act. 20. 27.

The proving then is to be before the Ordi-

Ordinary, General, Particular, or Special. By General I mean, the *Metropolitan*, or Arch-Bishop, before whom it is to be proved; in case the Testator have goods valuable, called *Bona Notabilia*, in divers Dioceses, whereof he is Superior.

Vide fol. proxim. If *Bona Notab* both in *Canterbury*, and *York*.

Of Bona Notabilia.

WHat shall be said to be *Bona notabilia*, is considerable; for thereabout hath been much diversity of opinion: Some holding, that they must be of forty shillings value; some five pound; some ten pound; yea, some that the value of a penny sufficeth to draw it to the Arch-Bishop, from the particular Bishop. But that difference of opinion I conceive to be now cleared, by a Canon made in the first year of King *Charles* his Reign, at a Convocation then held; whereby it is established, that five pound shall be the sum or value of *Bona Notabilia*; yet therein is this *Proviso*, that where by Composition or Custom in any Dioceses, *Bona Notabilia* are rated at any greater sum, the same shall continue not altered. It is likewise thereby provided, that if any man dye in *Itinere*, *viz.* in his jour-

Canon 92, 9

journey or travel, the goods which he then hath about him, ſhall not cauſe that Adminiſtration ſhall be committed, or the Will proved before the *Metropolitan*.

Having conſidered of the value: now another Point obſervable, is, what things ſhall be ſaid to be *Bona Notabilia*. And as to that, Debts owing to the Teſtator, are, *Bona Notabilia*, as well as Goods in poſſeſſion, their value being anſwerable: yet, I think, if the *Penal* ſum of the Bond be but five pound, for payment of a leſs Sum, although the Bond be forfeited; yet in the Spiritual Court, where reſpect to Conſcience ſuppreſſeth the favouring of Executors; this will not be taken to be, *Bona Notabilia*, *viz.* of five pound value, although in Law, the whole *Penal* Sum be a duty. But if the Debt be five pound, or more, though it be deſperate, or due from the King, againſt whom no Suit can be, but onely by Petition; yet this will ſtand for, and as *Bona Notabilia*, as I take it, in the Court Spiritual; though thereabout I can but conjecture, ſince the Rules of our Law determine it not. And this Point, touching the King's being Debtor, I find debated

21 Eliz. ted in the late Queen's time, but not resolved, so far as I find: But there *Popham* at the Bar urged, that no debt should be *Bona Notabilia*; and if it should, yet not such; for which no remedy by Suit, as in that Case, the Queen being debtor. Yet a further Question Local, is touching these debts, or things in Action, in what Place, or Diocess, they shall be said to be, as *Bona Notabilia*, *viz.* Whether in the place where the debtors be, or where the Obligations, or other Specialties be. And as to this the Law hath been taken, That because the persons of the Debtors be moveable, passant and transitory; therefore these debts shall be said to be, and to make, *Bona Notabilia*, where the Bonds, or other Specialties be, and not where the debtors inhabit and dwell: and so was it not long since conceived by Justice *Walmsley*, and Justice *Beaumont*, in one *Treymain*'s Case, no other contradicting it. Herein therefore, many are mistaken, who onely in respect that the persons of the Debtors do dwell in foreign Dioceses, other then the places of the death of the Testator, or where his other goods were, do take Administration in the Prerogative Court, though the Specialties remained

Goods considerable, or conspicuous.

Hil. 17 Eliz. M. Com. Da. *Vide* 13 and 14 Eliz *Dy.* 305.

ned where the party dyed, or his goods reſidue, were. But in caſe the debts be onely by Contract, without Specialty, then indeed they are to be eſteemed *Bona Notabilia* there, and in that place where the Debtor is, as the ſaid Judges well conceived the difference. But in caſe Land be given to *Executors* for payment of Debts or Legacies, this ſhall be not *Bona Notabilia*, as I take it, though it be *Aſſets*.

Of the validity, and invalidity of Probates.

AS to the third Point, we will firſt ſee of what validity an erroneous proof is, and thereabout we ſhall find this difference: admitting that one hath not *Bona Notabilia* in divers Dioceſſes; ſo as of right, the proving of the Will appertaineth not to the *Metropolitan*, and yet the Will is proved before him; this is not meerly void, but ſtands in force till it be reverſed by ſome Sentence upon Appeal, as was reſolved between *Vear* and *Jeoffryes*, in the late Queens time. But on the other ſide, in caſe one have *Bona Notabilia*, in divers Dioceſſes; or a peculiar, and a Dioceſs; and yet the Will is 12 Eliz.

proved before the particular Bishop, within whose Diocess part of the goods are; this is meerly and utterly void, without any reversal. So also of proving in some peculiar. And in case one have, *Bona Notabilia*, both in the Diocess of *Canterbury*, and in the Diocess of *York*; the Will must be proved, either before both *Metropolitans*, if within each of their Jurisdictions there be, *Bona Notabilia*, in divers Diocesses; or else, as I take it, if there so be not in any of the places, then before the particular Bishops in those several Diocesses where the goods are. Or, if within the one Jurisdiction *Metropolitan*, the Testator had goods in divers Diocesses, and in the other, but in one Diocess; then in the one place is the Will to be proved before the Arch-Bishop; and in the other place, before the particular Bishop, as I conceive. And so also of peculiar Jurisdictions. And in some places Arch-Deacons have peculiar, or Jurisdiction ordinary, and power to take *Probates* of Wills, and grant Administrations. But where any like error, or misproving is, in these respects, it is cause of reversal, or of nullity, according to the former difference; so also, if there be falshood

hood in the proof, were it *Communi forma*, that is, without Witneſſes, or by examination of Witneſſes, yet may it in the Spiritual Court be undone; if either diſproof can be made, or proof of revocation of that Will once made, or of the making of a latter.

Now, yet admitting the Will true and right, and alſo rightly proved; let us yet ſee the force and ſtrength of the proof, or Will ſo proved. It being under the Seal of the Ordinary, cannot be denyed, ſaith one Book, to wit, Whether this ſhewed forth, be a Will proved, or not; no, though the Proof be but indorſed on the back, *viz.* that it is ſo proved, ſaith the Book. But notwithſtanding the Defendant ſo ſued, may deny that the Plaintiff is Executor, as not being concluded, nor eſtopped by the *Probate* ſo to ſay. And the reaſon is, becauſe the Seal of the Ordinary is but matter in Fact, and not matter of Record: nor are the Sentences of Divorce, and the like, in the Spiritual Court, Judgments, or matters of Record; as hath been often held.

9 *Ed.* 4. 47.
22 *Ed.* 4. 50.
22 *H.* 6. 32.

Plowd. Com. 282. 44 *Ed.* 3. 32. 19. 1 *Aſſ.* p. 2.

Of the Relation of Probate, *and* Refusal.

Plow. Com. 281. 1. 283.

AS for this last Point, both the Proving and the Refusal, shall have Relation to the death of the Testator, as I take it, to divers purposes. So as to the Proving, saith the L. *Dyer* expresly and confidently, in *Greisbrook* and *Foxes* case; and the resolution also of the Case proves it. For there Administration being committed before any Will proved, or notified to the Ordinary, as it should seem, the Administrator sold some of the goods to *J.S.* and after the Executors (proving the Will) brought an Action of *Detinue* for those goods against *J.S.* who pleaded this Administration and Sale; and thereupon the Executor demurred, and Judgment was given for him; as having by the proving of the Will, disproved the Administration *ab initio*. But it is true, that Judgment was given onely by two Judges; one being absent, and the other dissenting in opinion: yet I think it was right, and according to Law; and that Refusal shall have the like relation; else could not the Administration relate to the death of the Intestate, as it doth to some pur-

18 H. 6. 23, 2. 9. E. 4. 33. 47. Not to make good a Release made before Co. lib. 5. 28.

purpoſes, expreſſed in divers Books, *viz.* to have an Action of Treſpaſs, for goods taken before Adminiſtration committed, and to have a Rent, growing payable in that mean time, *&c.*

39 H. 6. 8. 2 Ma. *Dyer*, 110.

What Fees to be paid upon *Probate*, or for Copies of Wills, or Inventories.

Per Stat. 21. *Hen.* 8. Cap. 5.

1. *Where the goods amount not to above five pound, onely ſix pence to the Scribe.*
2. *Where they be above five pound, but under forty pound,* 2 s. 6 d. *to the* BB. 12 d. *to the Scribe.*
3. *Where above forty pound, to be taken but* 2 s. 6 d. *to the* BB. 2 s. 6 d. *to the Scribe, or* 1 d. *for each ten lines of ten inches long, at the Scribes choice.*

THeſe Sums are to ſatisfie, both for Proving, Regiſtring, Sealing, Writing, Praiſing, making of Inventories, giving Acquittances, Fines, and all other things concerning the ſame.

Where Land is given to be ſold, neither

the money raised, nor the profits thereof, shall be accounted as any of the Testator's Goods or Chattels, saith the Statute.

Note, that the Will is to be brought with wax thereunto ready to be sealed, and proof to be made of the Will, according to common Custom.

For making the Inventory, the Executor is to take, or call to him two Creditors, or Legatees of the Testator, and do it in their presence; or in their absence, or refusal, two honest persons being the next of his kin; or in their default, two other honest persons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remain with the Executor.

The Executor is to make oath for the truth of it.

For a Copy desired by any, either of a Will or Inventory, no more is to be paid, then before is allowed, for the Registring with the like election to the Scribe or Register, as is abovesaid.

Mr. *Swinborn* saith, That an Executor is to swear, and if it should be thought fit, to be bound to make a true account, when he shall be thereunto lawfully called by the

the Ordinary: Of this account, see in *page* 274. And of accounting, some Books of the Common-Law make mention, as 13 *Edw.* the third, *Fitzherbert Exec.* 91. Where *Trew* saith, That of a thing in Action, no account shall be before the Ordinary; but *Parn* seems of a contrary opinion. And elsewhere it is said, That where a debtor is made Executor to the Debtee, he shall yet account before the Ordinary for this debt; yea, as of money in possession, saith one, which others denyed.

An Executor, by wrong, shall be drawn to account before the Ordinary, saith *Moyle* Justice. But saith S. *German*, he may not force any to account, against the Order of the Common-Law; (not shewing what that is.) And *temp. Edw.* the 4. is is said, at least by the Reporter, that after the Will proved, the Ordinary hath no more to do; *quod non credo.*

Also, of the Oath of an Executor, divers Books tell, but not to such purpose, as *Swinb.* but truly to perform the Will.

See also 31 *E.* 3 cap' 11. An Administrator shall account as an Executor, *Fitz.* Ex 91. & 847. *viz.* 18 *E* 2. *Tit.* Brief. 48 *E.* 3. 14, 15. Of a duty resting in account, it is said the Legatee shall have remedy by account in the Spiritual Court. 18 *Ed.* 4. c. 3. *Moyle.* 4 *H.* 7 15. *Per Wood.* 9 *Ed.* 4. 47. *Doct. & Stu.* 78. b. 21 *E* 4. 22. *Plowd. Com.* 544. 4 *H.* 7. 15. *Kelw.* 3 *Rep.* 64. a.

CHAP.

CHAP. V.

What things shall come unto Executors, and be Assets in their hands, and what not.

THe things which shall come to Executors, are of great multiplicity, and would make a large and confused heap, if tyed together in one bundle or lump. I will therefore divide and sort them out in parts, after the best manner I can. First, we will divide them into things possessory, or actually, in the Testator; and things in Action, or not actually, in the Testator. Secondly, the Possessory into Chattels, real and personal; or (as some less properly express it) moveable and immoveable.

Of Chattels real Possessory.

THese may be divided in to 2 kinds, *viz.* living, and not living; the living are not many and various. 1. The Wardship of the body of another (be it by reason of a tenure of the present Owner, or by Assignment from the Kin, or other Lord of whom the tenure was) is

a

a Chattel real, not perſonal, though it be an intereſt in the perſon of another; but it is in reſpect of a Tenure of Land, or other Hereditament, and is for years, *viz.* during the minority, or till marriage had, and ſo is real. Next, a Villein for years (as by Grant for a term from him that had the Inheritance) is a Chattel real. As for an Apprentice, for years, it is by Cuſtom, as I take it, that he goeth, or is derived to Executors: But for reaſon after ſhewed, I think this Intereſt be not in the reality, but in the perſonality rather. So of a Debtor, in Execution for Debt, the intereſt in him, or perhaps more properly in his liberty, is not, as I conceive (for reaſons which after I ſhall expreſs) a real, but a perſonal Chattel. The like Law of a Priſoner taken in Wars. As for Fiſhes in a Pond, Conies in a Warren, Deer in a Park, Pigeons in a Dove-houſe, where the Teſtator had the Inheritance, or but for life, in the Pond, Warren, Park, and Dove-houſe, they are not Chattels at all, nor to go to the Executors, but to the Heir, with the Inheritance. If the Teſtator were but a Termer, they are to go to the Executor, but as acceſſary Chattels, following the ſtate of

lowing the ſtate of their principal, *viz.* the Warren, Park, Dove-houſe, Pond, *&c.*

The real Chattels, not living, are either in Houſes or Lands moſt uſually, and that three wayes. Firſt, by Leaſe for years. Secondly, by Wardſhip of Lands held by Knights-Service. Thirdly, by extent upon Judgments, Statutes, or Recognizances; or in things iſſuing out of Houſes or Lands, as Rents, Commons, Eſtovers, or ſuch like. But where an Inheritor reſerves a Rent upon a Leaſe for years, this ſhall not go to the Executor, but to the Heire, with the Reverſion, other then Arrerages of it behind at the death of the Teſtator. Alſo Commons, Corodies for years, Advowſons, Tythes, Fairs, Markets, Profits of Leets, and ſuch like, which the Teſtator had for years, all which may accrue any of theſe wayes, as the firſt, are Chattels Reall. Yea, one ſimple preſentation to a Church, upon the next avoidance, is a Reall, and not Perſonal Chattel, before it come to be void; and what then it is, we ſhall after ſhew. And the title accrued to the Crown, upon attainder of Felony, where the party held not of the King, *viz.* the *Annum, Diem & Vaſtum*, that is,

is, power not onely to take the profits for a year, but to waste and demolish Houses, and to extirpate and eradicate Trees and Woods, is but a Chattel, and therefore though granted to one and his Heirs by the King, yet shall go to the Executor, and not to the Heir. Temp. E. 1. Assize 124. Fitzh.

Some doubtfull, or lesse clear Cases, touching Chattels Reall.

First, where we speak of Wardship, it is not to be understood of Wardship by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian, who now after the death of the first Guardian, shall be next of Kinne, if the Ward continue under fourteen years old, else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assignes, this is no Chattel, nor shall go to the Executor, nor to the Heire, but to him who first enters, and claims it as an Occupant, if no Assignment be in the life of the Lessee made: Contrarily, of a Lease for many years, if three, or more or lesse, so long live, this is a Chattel, and shall go to the Executor. So an extent 37 *Ass.* p. 12.

upon

upon a Statute, yet it is delivered to the party as a Freehold, *viz. Ut liberum tenementum*; but that onely makes it to be *quasi liberum tenementum*, as to the maintaining of an Assize, if wrongfully put out. Where one is seized in the right of his Wife, of Land, or other Hereditament, and is attainted of Treason or Felony, the profit thereof, accrued unto the Crown, is but a Chattel; and though the King grant it to one, and his Heirs, yet it shall go to his Executors. And if one, having a Lease for many years, *viz.* 100. 500. or more, or less, and doth devise and bequeath the same to *A.* and the Heirs Males of his body; and for want of such Issue, to *B.* and the Heirs Males of his body, and dyeth, having Issue a Son, the Term shall not go to his Son, but to his Executor, or Administrator; for it cannot be made a matter of Inheritance: so if *A.* had dyed without Issue Male, the term should not have gone or remained to *B.* but to the Executor or Administrator of *A.* as was lately adjudged in the *Exchequer*, between Sir *Robert Lewknor*, and Mistris *Hammond*. So of an Advowson, or any other Hereditament, granted or devised to one and his Heirs for

4 E. 3. *Ass.* 166. Br. Chat. 15.

for 100 years; or if ſuch a Termer grant a Rent out of the Land to *A.* and his Heirs or the Heirs, or Heirs Males of his body; yet ſhall the ſame go to the Executor, and not to any Heir; for it being derived out of a Chattel, cannot be any Freehold or Inheritance, but is it ſelf a meer Chattel. *Partus ſequitur ventrem.*

39 E. 3. 37. So *Manwood*, if granted for life, it is but a Chattel, *Plow. Com.* 14.

Of Chattels Perſonal.

PErſonal Chattels, or goods moveable, are alſo in like manner to be divided into quick or dead. The quick are Chattel of all kinds; as Sheep, Horſes, Kine, Bullocks, Swine, Goats, Geeſe, Ducks, Poultry, &c. There may be alſo in living Creatures reaſonable an Intereſt, as in a Chattel perſonal; as in the perſon of a man taken in Execution for Debt. And this I hold to be in nature, not a Real, but a Perſonal Chattel (as before was touched) for that debt is the root of it, and the body is but a pledge or gage, diſchargeable inſtantly upon Payment, Releaſe, or other Diſcharge of the debt. Like Law of a Priſoner taken in the Wars; for thereof, and there-

No. na. br. 88. *Reg. orig.* f. 102. There is mentioned that the prisoner was to have 159 l. for his ransom. *Bro. no. ea.* 295. & *tit. Property.* 38.

therein, as in a Chattel, hath the party a legal interest: as appeares by a Writ of Trespass in that Register, for taking away a Prisoner, *viz. Quare quendum Scocum Prisonarium suum cepit, &c.* And note lately, *viz.* In the time of King *Hen.* the 8. the King himself, upon the winning of *Bullen*, bought divers Prisoners of his Subjects. And by a Statute in the beginning of *Hen.* the 6. his time, this Interest in a Prisoner is mentioned as valuable, and coming from one King unto another; therefore doubtless, shall go from Testator to Executor by death, and not be infranchised or freed thereby. The interest which one hath in an Apprentice, I take to be rather Personall than Reall, though for years, because not springing out of any Reall Root, as Wardship, and Villienage do; but out of a meer contract. As for a Servant, whose Master is dead, doubtless he is legally discharged, and is not Servant either to Heir or Executor; but meet and honest it is, that one of them continue him in service, till a fit time of providing for him a new Master; and fit for him, not to depart suddenly.

1 *H.* 6. *c.* 5.

Now for things personall without life; These

These are evident, *viz.* all houshold-stuff, Implements, and Utensils, Money, Plate, Jewels, Corn, Pulse, Hay, Wood felled, and severed from the ground, Wares, Merchandize, Carts, Plows, Coaches, Saddles, and such like moveable things.

More doubtful Cases, touching things Personal.

FIrst touching things living: If the Testator had any tame Pigeons, or Deer, or Conies, or Phesants, or Partridges; these, as well as Chickens, shall go to the Executors: so, though not tame, if they were taken and kept alive in any Room, Cage, or like Receptacle, as Phesants and Partridges often be; so Fish in a Trunk, as also young Pigeons, though not tame, being in the Dove-house, not able to fly out; yet their Dams, the old ones, shall go to the Heir, with the Dove-house. And if the Testator had any reclaimed Hawks, they also as Chattels Personal, shall go to the Executor, because they are things commonly vendible. And whereas Hounds, Grey-hounds, and Spaniels, be not so commonly bought and sold, nor so antiently have been; yet are they now grown to be

10 E. 4. 14, 15. Come of wild ones. 22 *H.* 7. *Celw. Rep.* f. 88. 118. Co. l. 1. 11. t. 50. 18. *H.* 8. 2.

10 E. 4. 14. 15 and 18 E. 4. 8. E. 4. 8. So of young Hawks in the nest. It is felony to steal those, *ergo*, they be goods.

a Marchandize, and why not? for although they be for the moſt part but things of pleaſure, that hindereth not, but they may be valuable, as well as Inſtruments of Muſick, both tending to delight & exhilarate the ſpirits; a cry of Hounds hath, to my ſenſe, more ſpirit and vivacity, then any other Muſick. Add hereto, that there may be ſome profit and advantage gotten by them, both *quoad adeptionem boni, & ademptionem mali*, the getting of ſome good food, and the preſerving of others; as Lambs, Conies, Fiſh, Poultry, by killing Foxes, wild Cats, and others, which deſtroy them. And we know, that money is recoverable in Damages, for taking away ſuch, or a Maſtiff, ſerving to keep an houſe. So of Ferrets, to catch Conies, &c. Therefore they are valuable. But it may, perhaps, be objected, that none of theſe above are Cattel, and therefore not repleviſable, conſequently, no property in them; for when more then one living Cattel is diſtrained, the *Replevin* is to be by the name of *Averia*, ſignifying Cattel. For anſwer, not to inſiſt that one may have property in divers things, whereof no *Replevin* lyeth, as Corn or Hey, not in Sacks nor Carts,

So an Hunters horn, a Faulkoners lewer, Hares, Deer, Pheſants, Partridges, wild Ducks, &c. are good meat.

Carts, money not ſhut in bag, nor box, &c. I further ſay, that even the word *Averia* may be applyed to theſe; for ſo I find to Hens and Capons in the Book of Entries, *viz.* in the Writ of *Curia claudenda*, where the Plaintiff complains of the *Defendants* not making his *Mounds*, *per quod Averia ipſius A. viz. Capones, Gallinæ & alia Averia ipſius A.* that is, whereby his Cattel, *viz.* Capons and Hens, and other his Cattel, came into the Plaintiffs houſe and garden to his damage, &c. And both *Newport* and *Newdigate*, hold that a Writ of *Replevin* lyeth of ſuch things; though *Brudenel* were of contrary opinion, yet he alſo held an Action of Treſpaſs maintainable for taking of them, and therfore admitted a valuable property in them. Now come we to things without life; and firſt, to thoſe abroad in the fields. Put the caſe, that a man dies in *July* (before Harveſt I mean) ſeized for life, or in Fee or Tail, in his own right, or his wife's, or eſtated for years of Land, in the right of his Wife, being ſown with Corn, or any manner of Grain, the common ſaying is, *Quicquid plantatur ſolo, ſolo cedit*; yet this ſhall go the Executor of the Husband, and not to the Wife or Heir, who ſhall

Fol. 142.

Hen. 8. f. 1.

have the Land, but Hay growing, *viz.* Graſs ready to be cut, Apples, Pears, and other fruit upon the Trees ſhall go to the Wife; as alſo if they had been upon a man's own Land of Inheritance, they ſhould go to the Heir, though the Corn ſhould go to the Executor. The reaſon of difference is, becauſe this latter comes not meerly from the ſoil, without the induſtry and manurance of man as the other do; and I take Hops, though not ſown, if planted, and Saffron, and Hemp, becauſe ſown, to pertain as Corn to the Executor. All thoſe yet ſhall paſs to one, to whom the Land is ſold or conveyed, if not excepted, though never ſo near reaping, felling, or gathering. But what if the Wife had the Leaſe for years, as Executor to ſome former Husband, or other Friend, and the Husband after ſowing dies, who then ſhall have the Corn? Certainly the Corn ſhall go to the Executor of the laſt Husband, at leaſt ſo much as is more then the years value of the Land, or the making it up by addition of other things; for the value is to be Aſſets for payment of Debts and Legacies. Put the caſe again, that the Husband and Wife were joynt-tenants of the Land, and

Roots of Carrott, Parſneps, Land ſown, whereon is ripe Corn.

For he was Tenant for life in effect.

and then the very Corn growing shall survive to her, together with the Land, and though the husband sowed it, yet shall it not go to his Executor. Being in consideration of things growing on the ground, let us not forget to think of Trees sold by *J. S.* seized of the Inheritance of the Land to *J. D.* who dyeth before felling, this Interest is a Chattel which shall go to the Executor, and not to the Heir of *J. D.* but some colour may be, that these, because fixed to the Soil and Free-hold are real Chattels, as the Interest in Land is, and not personal: So also of Trees excepted by him who selleth the Inheritance of the Land; but in both Cases I conceive this Interest to be personal, and not real; for that, as it is a propriety of Chattel in the Vendee, or Vendor, with exception, it stands in consideration severed and abstracted from the Soil or Ground, where the Trees grow, though the Trees be not actually severed by the Axe from their Mother Earth. But if the Lessor for years or life, do except the Trees, these continue parcel of the Free-hold and Inheritance. And after Corn reaped, and before Tithe set out, the Inhetitor of the Tythe dying, I think the

The Wife also shall have convenient apparel. 33 *H.* 6. 31. 2 *Eliz. Dyer.*

Col. 11. f. 48.

Executor, and not the Heir, ſhall have the Tythe after ſet out.

Now let us come home to the Teſtator's houſe, and ſee in, and about it. Some doubt What pertains to the Heir, and what to the Executor. Queſtion hath been of old, and of late, touching Coppers, Leads, Furnaces, Fats for Dyers or Brewers, Pales, Rayls, Glaſs in Windows, Tables, Dormants, Wainſcots, Doors, Locks, Keys, and ſuch like, to whom theſe ſhould go? Whether to the Heir or Executors? And in the latter end of *Henry* the Seventh his time, an Executor taking a Furnace, which was ſet in the middle of a houſe, and not fixed to any Wall, the Heir brought an Action of Treſpaſs againſt him for ſo doing, and it was adjudged for the Heir, *viz.* that this was to go as part of the Free-hold and Inheritance to the Heir; and long before in *Edward* the third his time, it was debated, Whether it were Waſte in a Leſſee, to remove, or take away a Furnace, or not: But I find no opinion delivered by the Judges: But in the late Queen's time, Juſtice *Walmſley* ſaid, That the Lord *Dyer's* Opinion was, that where the Furnace is not fixed to the Wall,

Of Houſes, or things about the Houſe, 42 E. 3. 6.

21 H. 7. f. 26

42 E. 3. f. 6.

Wall, the Leſſee might within his Term take it away. Contrarily, if it were fixed to the Wall; for then it ſtrengtheneth the houſe. And yet, notwithſtanding it might be in the one Caſe ſo removed by the Leſſee; yet is it not there, as he ſaid, a Chattel perſonal or moveable, ſo as it is attachable; and there the Caſe being, that a Clothier being a Termer of an houſe, had fixed a Copper to the Wall, with Looms and Pricks neceſſary for his Occupation, a Judgment being had againſt him, the Sheriff delivered the Copper in Execution as a Chattel, and after the Leſſee took it up, and it was taken from him by vertue of the Execution: whereupon he brought an Action of Treſpaſs, and by all the Judges, the Action was maintainable. And whereas it was found by the Jury, that by the Cuſtom of *Kent*, the Leſſee might remove ſuch a Copper; Juſtice *Beaumond* ſaid, that without any Cuſtome, a Leſſee might ſo do at any time during his term. But it is to be noted in the ſaid Caſe, that the Furnace was by it ſelf delivered as a movable Chattel, & not as part of the houſe; for that was not medled withall, nor at all delivered in extent (as

H 37 *Eliz.* *Auſtin's* Caſe.

in the Case between *Miles* and *Pratt*, where both house and Copper were delivered upon a Statute) the house belike being held upon such a rack-rent, as that the party did not desire to have it, for he might have had the whole being a Chattel, and so have used the Copper during the term. And as touching all other fixed things, the Law was taken in the said case in *H.7.* his time, to be all one, as in the case of the Furnace, *viz.* that they should go to the Heir, save onely that for Glass in the windows, *Pollard* said it was otherwise, *viz.* That that should go to the Executors, which none there denied.

Co. lib. 4. fo. 93, 94. But since, in the late Queen's time it was otherwise resolved touching Glass, that it should not go to the Executors; and the like was there said touching Wainscots and so also by the Lord *Anderson* in the said case of *Austin*. And touching Posts fixed, for that they be parcel of the Free-hold; so also of Mill-stones, Anvils, Doors, Keyes, Windows, none of these be Chattels, but parcel of the Free-hold, or thereto pertaining, therefore not the Executors.

Things in Gardens. Now to come to Gardens also: whereas I before laid down a difference be-

betwixt things ſowed, or not ariſing from the Earth, without manuring; and ſuch as grow of themſelves; It will thence be concluded that the roots of Carrets, Parſneps, Turneps, Skerrits, and ſuch like, coming and ariſing from yearly ſowing, muſt go to the Executor, and not to the Heir; the caſe being ſo, that the Gardner and Sower had the Inheritance of the Garden or Soil: now though in moſt places this can rarely be a queſtion of value, yet about *London*, and ſome great Towns it may, and therefore not unworthy of a line or two, a thought or two, the rather, for that the reaſon of this caſe may give light touching right in other Caſes. And in my opinion, theſe (notwithſtanding there is a ſowing and manurance to generate them, and cauſe their being) ſhall go to the Heir and not to the Executor: my reaſon is, for that the thing of profit is the root which is hidden in the ground, and I hold it no reaſon, nor agreeable to Law, that the Executor ſhould dig and break the ſoil and ground to ſearch for her entrails; he is to content himſelf with that which is above ground, as Melons of all kinds, and the like, whoſe fruit is above the ground: but

as for Artichokes, though the fruit be above the ground, yet I think they have not such yearly setting, or manurance as should sever them in interest from the soyl, therefore they shall go with it to the Heire.

Let us now consider of things, though not fixed to, yet usually kept in houses, *viz.* writings and evidences, whereabout generally, no doubt can be, but that they follow the interest of the Land, so as if they touch Inheritance, they pertain to the Heire; if but Termes of years, Goods, Chattels, or Debts, they pertain to the Executor; yea so do Statutes, and Bonds in Law (howsoever otherwise in equity) though they concern the assurance and enjoying of Inheritance purchased. What if *A* morgage the Inheritance of Lands to *B*, upon condition of redemption by payment of five hundred pound to *B*, his Heire, or Executor, and *B* dyeth, the Deeds being delivered into his hands; now the Heire, not the Executor, shall have them; for though the money may be payd to the Executor; yet (mean time) the Land descends to the Heire, nor is there any debt to the *Executor*, for *A* may choose to pay, or not. Put it

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on the other ſide, that the Land had been ſold for five hundred pound, not paid to *A*, but a Condition that if not paid to him, his Heire or *Executor*, by ſuch a day, then to re-enter; and *A* dieth, here is a debt to the *Executor*, and no Land deſcended to the Heire of *A*, yet ſhall the Heire have the Deeds, for that a Condition is deſcended to him. Queſtion hath been touching Boxes and Cheſts, wherein the *Evidences* concerning Inheritance are; and although the better opinion in our Books, doth pitch upon this difference, that where they are ſealed up, they ſhall pertain to the Heir; otherwiſe, where not ſealed; I cannot conceive that difference to be grounded on good reaſon; but rather think that Boxes, which have their very creation to be the houſes or habitations of Deeds, ſhould, as appurtenant to them, go to the Heir, whether ſealed or not. On the other ſide, Cheſts made for other uſes, *viz.* the keeping of Napery, or Apparel, ſhall not, as I conceive, be taken as appurtenant to evidences becauſe ſome be in them, for ſo may other things alſo be: Nor as touching them can ſealing be of any effect, but rather locking, and not locking

41 *E.*3.2.
36 *H.*6.26.
18 *Ed.*3,4.
3 *H.*7.15.

Que. If ſole uſe that way make a difference or not.

locking must make the difference touching them, if any difference by incloſure.

CHAP. VI.

Of things not actually in the Teſtator, but accruing to the Executors, by or after the Teſtators death.

THeſe be of divers ſorts, the firſt, and chief whereof are things gotten and acquired by Action or Suit. Secondly, by Condition or Covenant without Suit. Thirdly, by Remainder.

Of things in Action.

TO ſpeak firſt of the firſt, it is clear, that debts due to the Teſtator, be it by Bond, Statute, or Judgement, or for Arrearages of Rent, are not Aſſets to charge the Executor, untill receipt of them; and it is clear, that the Action to recover theſe doth pertain to the Executor, and that the debt and dammages recovered ſhall be aſſets to charge the Executor. So alſo of Actions of *Detinue*, and

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of Covenant for any thing personal, or any Chattel Real, Lease, Wardship or the like. But perhaps some will doubt of Covenant touching Inheritance, *viz.* the assurance of Lands, or enjoying thereof, free from this or that incumbrance, or the like: Yet even in those cases, if the Covenant were broken in the Testators life time, I think clearly the Action is accrued to the Executor, for that his Testator was to recover damages in the Action of Covenant for that breach, and he being intitled to these dammages as principal, and not any accessary thing in that action, the Law hath cast that action upon the Executor. And that is the cause why, if waste be committed in the life of the Lessor by his *L*essee, and then the *L*essor dyeth, his Heir can have no Action for this waste, *viz.* because he cannot recover the treble damage; so neither can the Executor have it, for that he cannot recover *locum vastatum*, the place wasted, the Inheritance whereof is in the Heir.

A Church of the Testat. Inher. become void in his life, comes to the Exec. as a thing in action; but is not Assets, for not vendible.

That the Executor at the Common Law could not maintain an Action of Trespass for goods of his Testator, taken away in his life-time, seems to be implyed by the Statute in the time of K. *Edward* the

11 *H.*4.32. 45 *E.*3. 3, *No.na.br.*59. 4 *E.* 3. *c.*7.

And the like given to Executors of Executors *per. ſtat.* 25. *E.* 3. *c.*5. 17 *E.* 2. *Fit.* 106.

the third, which gives ſuch action: Yet it ſeemes that a *Replevin* was maintainable by the Executor, at leaſt in ſome caſes, for goods taken or diſtrained in the Teſtators life-time: But in caſe the diſtreis were for Rent, or Service, it is ſaid a little after the making of that *Statute*, that the Lord may not now avow for his Rent, or Service, becauſe his Tenant is dead, but muſt ſet forth the matter, and thereupon juſtifie to excuſe himſelf from anſwering damages, and the Executor ſhall by this Action recover the Cattel or Goods, and that by the Common Law, ſaith the Book, though the Statute of *Marlebridge* had never been made, for that the propriety remained in the Teſtator. Note, it ſpeaks not at all of the ſaid Statute of 4 *Edward* the third. But *Newton* in the time of King *Henry* the 6. would have it, that the Executor in that caſe ſhould not have a *Replevin*, but an Action of Treſpaſs grounded upon the ſaid Statute, *viz.* 4 *Edw.* 3. which me thinks cannot be by any meanes, by reaſon of the Statute of *Marlebridge*, cap. 3. *Non ideo puniatur dominus, &c.* for the Executor, as well as his Teſtator, is thereby reſtrained, as I think, from the Acti-

c. 21. meant *ut credo.* 21 *H.* 6 1. but *Markham* c *contra.*

21 *H.* 8. *c.* 19. 4 *E.* 3.

on

on of Treſpaſs againſt the Lord. As for that no Avowry can be made upon the Tenant, that is now remedyed by a late Statute; The other Statute hath been taken to extend to other things than goods moveable: for where a Church becoming void, a ſtranger preſented thereunto wrongfully, and the Patron dyed, it was reſolved in the late Queens time, that the Executor might by the equity of the ſaid Statute, maintain a *Quare impedit*. But whether an Action of Treſpaſs lyeth for an Executor, againſt him who ſpoyled the Teſtators Corn, Graſſe, or Wood growing, hath been queſtioned, but no where reſolved to my knowledge. I think it may lye, with ſome difference: Firſt, for that the Statute of 4. *Edward* the third, doth not onely ſpeak of Goods carried away, as limiting the Law to that treſpaſs ſolely and particularly; but ſpeaks generally of Treſpaſs done to Teſtators; and then brings in that particular of goods, as one Inſtance. Now there be many Caſes of inſtances or enſamples given in acts of Parliament, which yet do not reſtrain the remedy or *purview* to that particular, or from extending to other Caſes of like nature.

The B. of *Coven.* & L. and *Sales* caſe M. 32. & 33 *Eli. in com. ba.* So of Raviſhment. *Pl. gard.* 7. *H.* 4. 2. & 7. *H.* 4. 6. *Eject. Firm. et Tild. De clauſo fracto* meerly it lyeth not. 11. *H* 4. 7. This *Perian Juſt.* did very judiciouſly urge in *Sales* caſe *ſupra.*

ture. Thirdly, the Stat. ſpeaks of treſpaſſes remaining unpuniſhed, which is meant to redreſſe: But it ſhould ſtill leave many unpuniſhed, if it ſhould have no larger extent, then to that one ſingular treſpaſſe, of Goods taken away, *viz.* moveables. Again, the Teſtator was clearly intituled to a recovery of dammages for this other treſpaſs, which if he had recovered, ſhould have come to his Executor; Yea the things themſelves, all, if felled in the Teſtators life, and part though not felled, ſhould have come to the *Executor*; therefore alſo the damages recoverable in lieu thereof, out of which (recovered) the Debts and *Legacies* of the Teſtator are to be ſatisfied. Beſide, this Action of Treſpaſs is a thing ſevered from the ſtate of the *Land*, ſo as if the owner thereof had, after this Treſpaſs done, aliened the *Land*, yet had not this Action remained to him, as I take it clearly. And why not as well as where a Treſpaſſe is done upon the *Lands* of the *Leſſee*, and then the terme expires, this doubtleſs doth not take away his Action, nor his *Executors*. But me thinks here may be ſome differences probably taken; as firſt between a Treſpaſſe

paſs in deſtroying or taking away Corn growing, and a Treſpaſs in Graſs or Wood growing: for the firſt being of that nature, as that, though the Owner had a ſtate of Inheritance in the Land whereon it groweth, and ſhould have dyed before ſeverance and felling. Yet it ſhould have gone to the Executor, and not with the Land to the Heir; therefore doubtleſs doth the Action for deſtroying or taking away thereof, accrue by the operation of Law to the Executor, in lieu of the thing taken or deſtroyed. Otherwiſe, perhaps, of Wood or Graſs, which by the Owners death ſhould have gone to the Heir, and not to the Executor. And yet here again another difference, me thinks, may be betwixt Graſs and Graſs, *viz.* betwixt that in Paſture, and that in Meadow, yearly mowed, and turned into Hay, not left to be conſumed by the mouthes of Beaſts, as that growing in Paſture: For as the Law diſtinguiſheth between theſe Soils, it gives precedency to Meadow, and makes it waſte for a Leſſee to plow it up, not ſo for Paſture. Yea, Tythe is paid of Hay, but not of Graſs growing in Paſtures; ſo the Meadow graſs being in the Owners pur-

poſe and intention, as a thing ſevered from the Soil, ſhould me thinks ſo be alſo in the eye and eſtimation of the Law, and therefore ſtand in a different ſtate, and account from Paſture Graſs.

A third difference may be in the manner of the Treſpaſs, *viz.* Where Meadow Graſs is eaten up with Cattel by a Treſpaſſer, and where by him mowed, and carryed away as Hay; for in this latter caſe, an Action of *Trover* and *Converſion*, for ſo many Loads of Hay, is doubtleſs maintainable by the Executor, though it ſhould be admitted, that in the other caſe of conſumption, by the mouthes of Beaſts, without ſeverance, no Action ſhould be maintainable by the Executor; which yet I admit not, but think the contrary probable.

For when Meadow ground, which yearly conceiveth (*Sol ſine homine generat herbam*) ſhall be ready to be delivered of her burden, if a ſtranger putting in a herd of Cattel, which ſwallow up, & tread down this fruit of her Womb before the Mower with his ſithe come as a Midwife to help her delivery, if then by the haſty death of the Owner, before Action brought, this great Treſpaſs ſhould be diſpuniſhable, it were

At leaſt, methinks, Action upon the Caſe here, & before, ſhold be maintainable.

were contrary, as me thinks, to the purpoſe of the ſaid Statute, and a great defect in the Law. Yet here, perhaps, touching this, a fourth difference may be, or ariſe out of the time of the death of the Owner, *viz.* where he dyeth before time of Mowing, and where not; for *Dato*, that in the former caſe, becauſe, if ſuch deſtruction or conſumption had not been, yet the Owner dying before ſeverance, this ſhould not have come to the Executor, but have gone with the Soil to the Heir, that therefore the Executor, who is not damnified, ſhould recover no damages: Yet in the other caſe, the Owner living till after Hay-time clearly paſſed, *viz.* till the end of *Auguſt*; me thinks now, ſince this fruit of the Meadows Womb ſhould have been a Chattel ſeveted, had not this Treſpaſſer made unlawful prevention.

Therefore, the Executor to whom the ſame ſhould have come, towards the performance of the Will, ſhould have, out of the ſaid Statute, an Action and remedy reached unto him, to recover recompence in damages for this wrong done in *retardationem Executionis Teſtamenti*. A fifth and laſt

difference may perhaps be in the ſtate of the Owner; for *Poſito*, that where the Land is his Free-hold, or Copyhold Inheritance, no Action ſhould be given to his Executor for Wood or Graſs taken or deſtroyed in his life-time: yet where he is but Tenant for years, Gardian, or Tenant by extent, ſo as the very ſtate in the Land was to come, and is come to the Executor (together with, *Quicquid plantatur ſolo*) me thinks the Executor ſhould have, together with the ſtate in the Soil, the Action to puniſh the Robber of, or Treſpaſſer upon the Soil. Thus having ſcanned and ſifted to the beſt of my ability, all differences and circumſtances of this point, how far I am wide, and wherein right, *Aliorum ſit judicium*, or rather, *Altioris eſto judicii*. But this is clear, that whereſoever Executors do recover any damages for Treſpaſs, or other wrong done to their Teſtator, the money recovered (at leaſt, if Execution be had, or money received) will be Aſſets in their hands, as well as Debts recovered upon Bonds or Bills, or Lands, by them taken in extent upon Statutes, Recognizances, or Judgments. Yea, without ever having theſe moneys, Executors may make them Aſſets

3 *H.* 6. 3. *Littleton*, fo. 42. *a.*

So held in *Sale*'s Caſe of damages in *Qua. Imped.* recovered *contr.* of the preſentment. Releaſing- 13 *Ed.* 3. *Tit.* 91.

Assets in their hands, *viz.* by making Releases or Acquittances, or acknowledgment of satisfaction; for this amounteth to a Receipt, and chargeth the Executors towards the Creditors, with the whole penal sum, though haply they receive but part, as the principal, or some like proportion.

Therefore, there is great caution to be used by Executors in this kind, that unless they be sure they have goods sufficient to pay all Debts and Legacies, they make no Release, Acquittance, or acknowledgment of satisfaction, for more then they receive, be it debt or damages.

And the like caution to be used by them, touching submission of debts or damages to Arbitrament, where by discharges of the same may grow; for the submission to the Arbitrament, being their voluntary act, although the Arbitrators by their Judgment, do discharge the debt or damage in part, or in whole; yet shall the Creditors have like remedy thereupon against the Executors, as if they had released, or, which is more, received the same.

Error 13 *H.* 4 6. 46 *E.* 3. Yet upon a Verdict in *Quare Impe* the Wife, not the Executor of Husband did seize. 9 *H.* 6. *c.* 4.

Other Actions there be of discharge,

which as the Teſtator himſelf in his lifetime might have had, ſo may his Executor after his death, *viz.* Writs of Error, Attaint, Diſceit, *Audita Querela*, *Identitate nominis*. But this laſt is given by Statute. Whatſoever is regained by any of theſe Wayes, as unduly loſt by the Teſtator, ſhall alſo be Aſſets.

Special Caſes pertinent to the Premiſes.

1. *Chattels come to the Executors from the Teſtators, yet not Aſſets.*
2. *Aſſets which be no Chattels.*
3. *Things in Action, and in the Perſonalty, turned into Chattels Real*, & è contra.

AS to the firſt, I exemplifie thus: *A.* makes *B.* his Executor, and dies; *B.* makes *C.* his Executor, and dies. The Goods left by *A.* to *B.* as Executor, far exceed his Debts and Legacies; or let us ſuppoſe no Debts nor Legacies of *A.* and that *B.* dyeth much in debt, above the Goods he leaveth, and did make no alteration of the property of the goods of *A.* but meerly left them to *C.* his Executor.

Now

Now ſhall not the Goods which came to *B.* as Executor of *A.* and ſo from *B.* to *C.* be liable in Law to pay the debts of *B.* yet in Conſcience, me thinks they ſhould, and that *C.* ſhould not receive them to his own uſe, as in Law he may, where *A.* left no debts. But if *A.* making *B.* Executor, did alſo by his Will give him all his goods; and he in his life-time made election to have them as Legatee, or by his Will, did ſo diſpoſe of them, or appoint them to go, as the goods he had as Executor, they could not be otherwiſe given or diſpoſed. Now by this election they were altered in property from being his as Executor, and ſo as his own goods ſhould be liable to his debts. But things in Action could not be ſo given or diſpoſed, *viz.* Debts, &c. yet if *D.* were indebted to *A.* one hundred pound, and *B.* his Executor took new Bond of him, or another for it, giving up the old Bond, now was it become his own debt, and ſo ſhall ſtand in his Executor.

Another inſtance of this, thus; If *A.* Patron of the Church of *D.* grant to *B.* the next avoidance, the Church becomes void, *A.* dies before he preſents, his Executor preſents, and hath the benefit

Or if a ſtranger uſurp in his life, and he dying, his Executor

recovers in a *Qua. imp.* as by *Sales* was done *infra Mich.* 32 & 33 *Eliz.* So held in *Sale's* Case, in *Com. Ban. Vendere jure potest, emerat ipse prius.*

of preferring his Son or Friend, yet shall this make no *Assets* in his hands for payment of Debts; for that he could not lawfully take money to Present. But if *B.* had dyed before the Church had become void; Then because the Executor might lawfully have sold it, the value should be *Assets* in his hands, as I conceive, except perhaps the incumbent had dyed so hastily after *B.* that the Executor had not time convenient to find out a Chapman, and to sell it.

If in the other Case a stranger had presented, and got his Clark admitted, and the Executors of *B.* had in a *Qua. Imp.* recovered damages, the money so recovered should have been *Assets*. Thus much of the first, *viz.* that some things of the nature of Chattels may come to Executors, and yet not be *Assets*.

Touching the second, *viz.* that some things may be *Assets* in the hands of Executors, which yet are no Chattels; I shall give but two instances. First, where a man leaveth a Villein for years to his Executors, and the Villein purchaseth Land in Fee-simple, and the Executor entreth into the Land; now hath he Fee-simple therein; and this Land is

22 *H.* 8. *Br. Villeinage* 46 If he die, how shall this be *Assets* in the Heir.

Assets

Assets for payment of the Testators debts. So, if a man by his Will give Lands in Fee to his Executors, to be sold for performance of his Will; These (before the money thereby raised) are Assets, both for payment of debts, and of Legacies; But if the Lands had been given to be sold onely for payment of debts, they should onely be Assets for that purpose, and not for payment of Legacies: and so, if it were expressed to be for payment of Legacies singularly, this should not be Assets for debts, as I take it. For since these are not Assets of their own nature, but so made by the Will and disposition of the Testator; me thinks they cannot be otherwise, nor farther Assets than as the Testator hath willed and disposed; but though Lands thus given were Assets before the Stat. 21 *Hen.* 8. *cap.* 5. Yet how can it be so, since the very words of the Statute be, that if one do will by his Testament or last Will, any Lands, *&c.* to be sold neither the mony thereof coming, nor the profits taken, shall be accounted as any of the goods or chattels of the Testators; which I conceive to be all one, as to say, that they should not be Assets;

3 *H.* 63. and so 2 *H.* 4. 22. If by Feoffment. *per Markham cap. Just. cont. Rickhill.*

See 9 *Eliz. Dyer* 204.

for

for when an Executor denyeth himſelf to have Aſſets, the form of his plea is, *Quod nulla habet bona nec cattalla*, &c. Yet ſince that Statute, *viz.* in the late Queens time, the Law was twice admitted, or conceived ſtill to be according to the third of *Hen. 6. viz.* that the Land deviſed to be ſold, or the money thereof coming, ſhould be Aſſets. Indeed, in neither of thoſe Books is there any mention of the clauſe in the ſaid Statute; and it is poſſible, that it might be forgotten, as in other Caſes ſometime hath happened. But caſting about how to reconcile thoſe Books with the ſaid Statute, and not to ſuppoſe the ſame forgotten at both times, both at the Barre, and Bench (though being but a ſhort clauſe in the middle of a large Statute to other purpoſe, it might well ſo have been) at the laſt, though not haſtily. I grew to conceive, that the ſaid clauſe being in an Act which limiteth the Fees of Ordinaries, and their Scribes, according to the value of the goods of the deceaſed, and then bringeth in this clauſe, that the Lands willed to be ſold, ſhall not be accounted as any of the goods, *&c.* The Parliament meant thereby only to exclude

9 H. D. 264.
14 H. D. 35.

clude them to this purpoſe, that they ſhould not be accounted as part of the goods in the valuation, according to which the ſaid Fees were to be rated; and though the words be general, that they ſhall not be accounted as any of the goods, *&c.* yet is it the more probable, that the Parl. intended no further then as aforeſaid; becauſe that clauſe after the Fees limited in anſwerableneſs to the values, is brought in by a *Proviſo*, *viz.* Provided alwayes, that if the deceaſed Willed any Lands to be ſold, the money nor profits ſhall not, *&c.* And thus perhaps it was underſtood and conſtrued in the ſaid late Queens time, though no mention be of any remembrance of that clauſe or proviſion in either of thoſe Caſes reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the perſonalty, into the realty, *& e contra*, I ſhew it thus: If a debt were due to the Executor, as Executor, by Statute, Recognizance, or Judgment, and he ſue Execution, and have Land of the debtors in extent: now is the perſonal duty turned into a chattel real. On the other ſide, if ſuch an Eſtate by extent, or a Leaſe for years mortga-

mortgaged come to an Executor, and the debtor or mortgager payeth the money due; now are these real chattels turned into Assets personal.

Another special Case of equity opposing Law.

IF *A* be bound to *B* by Bond, Statute, or Recognizance for assurance of Land, *B* dyeth, and the Land descends to his Heir; or be it that *B* sold the Land to *C*, and assigned to him the Bond, Statute, *&c.* yet must the Suit, or taking out be in the name of the Executor of *B*, and neither of the Heir, nor Assignee. And that which is recovered, or gotten in extent, will be Assets in Law to charge the Executor, as I take it; yet in equity it pertains to the Heir or Assignee. *Quere*, if the Executor meddle not, but onely suffer his name to be used.

Of things come to Executors by Condition.

FIrst, we will consider of Conditions bringing back to Executors goods, or chattels granted away by their Testators. Touching which, there is no doubt but if the Condition be any other than for payment of money, or other things

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valuable by the Teſtator, or his Executor, the chattels returning to the Executor is Aſſets in his hands: as put the Caſe a *Leaſe* for years, Horſes, Sheep, Plate, or other Chattel, were granted by the Teſtator to *A*, upon condition that if *A* did not pay ſuch a ſumme of money, or do ſuch other Act as the Teſtator appointeth, and this condition is not performed after the Teſtators death, now is the chattel come back to the Executor, and his Aſſets. But the queſtion hath been (and perhaps may be) where the condition is, that the Teſtator or his *Executors* ſhall pay the money to make void the Grant, and accordingly, the *Executor* after the Teſtators death payeth the ſumme out of his own purſe, not having any money of the Teſtators in his hands: in this Caſe coming in queſtion, *tempore Hen.* It was reſolved at the laſt, that this redeemed chattel ſhould not be Aſſets, but be to the *Executor* as his own proper goods, though at the firſt, three Judges were of contrary opinion, *viz.* that the goods redeemed ſhould be in the *Executor*, as goods of the Teſtator. And truly I muſt confeſs, that I cannot yet finde good ſatisfacti-

Note Diff.

21 *Hen.* 7.

on

on in that Books resolution, except we shall take the Case there to be such as that which is put and reported by the Lord *Dyer*, *tempore Hen.* 8. *viz.* that the money paid for redemption, was as much as the full value of the goods pledged, or mortgaged; or else shall admit the Case to be, that this redemption was not by payment at the day conditioned. As to the first, it were rare, if any should lend money upon a mortgage, where the thing mortgaged, is not of better value then the money lent; rare also, that an Executor should take care to redeem with his own money, that which should yield no benefit or advantage to him, or his Testator. Let us therefore scan and examine the Point, since the same may come frequently in use; and this we may the more decently do, because the Lord *Dyer* in the Margent of the Case by him reported, as aforesaid, saith expresly, that the said other *temp. Henry* the seventh, was not at all adjudged, himself having viewed the Roll, which he there sets down, and the names of the parties. We will therefore put the Case thus: *A* possessed of a Lease for sixty years, of one hundred pound Land,

Land, mortgageth it for five hundred pound; or be it that the mortgage or pledge be of a Jewel, or peece of Plate for half the value, and that before the day limited for payment, and redemption, *A* having made *B* his Executor, dyeth, and *B* at the time and place maketh payment, as was conditioned. Now the queſtion is, whether this Leaſe, Plate, or Jewel, being worth much more than the ſum for which it was mortgaged, ſhall be in him wholly in his own right, and to his own uſe, or partly, if not wholly, as Executor to *A*, ſo as to be ſubject to the payment of Debts and Legacies. Here it muſt be clearly admitted, that *B* was inabled to this redemption onely, and meerly by the Condition annexed to the mortgage, or pledging. It muſt alſo be admitted, that this Condition, and the power or intereſt to take benefit thereof to him, came, and was derived onely as Executor of *A*. This being premiſed, it muſt needs follow, (as to me it ſeemes) that the Condition working, and having his operation in the redemption to deſtroy the Grant, mortgage, or pledging, it muſt needs make theſe things again the Teſtators goods, *in*

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in quo prius, and so to be in *B* as *Executor*; since in that right onely he was intituled to take benefit of the Condition. For what is it which hindered, before this, from being the Testators goods? nothing certainly, but onely the force and strength of the mortgage or pledge: Now by the redemption that is become void, and hath lost its force; therefore the property of these things must now needs be, as if no such mortgage or pledge had been, or as if it had at the first been void, and of no force: Thus must the Condition work for him who made it, *viz.* *A* the Testator: and those of the contrary opinion in the time of King *Henry* the seventh, do yet say, that by this redemption the Testator is so much indebted to the *Executor*, as he disbursed for the redemption; which could stand with no reason, unless by it the property and interest should be reduced to the Testators behoof. That thus it is, is also proved, as to me it seems, by the Case of mortgage of Inheritance, upon which the Heir making payment, according to the condition, is not now in as a new Purchasor, but as Heire;

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ſo as he ſhall have his Age, and be in Ward even for this Land; Yea, it ſhall be Aſſets in his hands, for ſatisfaction of his Fathers, as other Anceſtor's debts; which in ſome reſpect is a harder Caſe, than that of the Executor, for he hath means to ſatisfie himſelf of the money disburſed, either out of the thing redeemed, or other goods of his Teſtator, but the Heir hath no ſuch means. Yet it will be asked, how the Executor can be free from miſchief? for if this thing redeemed, be intire, as the Cup or the Leaſe, the whole will be taken in execution for the Teſtator's debt. To admit this, yet here is one clear way of remedy, *viz.* The Executor may before ſuch execution, ſell the thing, and ſo pay himſelf, and retain the ſurpluſſage to the Teſtators uſe; and the like of this is frequent in uſe, *viz.* for Executors to pay off the Teſtator's debt with their own money, and to make themſelves ſatisfaction out of the Teſtator's goods. Beſides, it is not impoſſible, that this redeem'd thing ſhould be thus in intereſt parted, that anſwerably and proportionably, to the ſum disburſed for redemption, with reference to the value of the thing redeemed, a moiety,

or third part, or three parts thereof, should be to the Executor in his own right, as his own proper goods, and the rest in him as Executor. As *posito*, that *A.* and *B.* were Tenants in common of such an entire Chattel: *A.* maketh *B.* his Executor, and dyeth. Now hath *B.* one moiety as Executor, and another as his own proper; and upon a Judgment against him as Executor, that moiety onely which he hath as Executor, must be taken in Execution; and here may be remembred, how in Execution of a Judgment, or levying of an Amerciament out of an intire Chattel of more value then the sum to be levyed, the whole is to be sold, and the Surplusage above the Debt or Amerciament is to be delivered back to the Owner. For in all this debate, we must presume the thing redeemed by the Executor, to be of better value then the sum paid, else we may easily admit the whole to the Executor.

Again, the Lease for years, is not so intire a thing, I mean the Land let, but that thereof Partition may be made; yea, inforced by Action between joint-tenants, and Tenants in Common. But here will be objected, the Case of Redemption by

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the Daughter and Heir; who though ſhe have a Brother born after, ſo as now ſhe is no longer Heir, yet ſhe ſhal, as the Book ſaith, retain the Land redeemed from the Heir, as a *Perquiſite*, or Purchaſe. As for this (which I will not oppoſe) the Law ſo frameth, to the favour of the Daughter, becauſe of great miſchief to her, if being ſtripped of the reſt of the Inheritance by the Birth of a Brother, ſhe ſhould alſo loſe that which her money had redeemed, without having any remedy to have her money again, or any recompence for it; but in the other Caſe, there is no ſuch miſchief, for that the Executor may pay himſelf, as hath been ſhewed.

Now on the other ſide, if the Caſe ſhall be underſtood, that the Redemption was by payment after the day, then will I eaſily admit, that the property or intereſt, is in the Executor to his own uſe; or that the Condition, now having no power to reduce it back, or to operate any thing, it is rather a re-emption than a redemption, ſince it was at the Will of the Mortgagee, to diſpoſe it at his pleaſure; and any ſtranger, as well as the Executor might thus have redeemed

med, *viz.* repurchaſed it; therefore onely Equity, and not Law, in that Caſe, can make any part of the value Aſſets in his hands: And ſo alſo, I think, if we ſhould admit in the other Caſe of payment, at the day that the property of the Chattel is to the Executor as his own, and not his Teſtator's goods, no part of ſurpluſage of value, can in Law be Aſſets, howſoever in Equity.

Laſtly, if the Executor redeem by payment, at the day with the Teſtator's own mony or goods, none will doubt, but that the thing redeemed, is in him as Executor, and the money by him paid for Redemption is well Adminiſtred, the goods redeemed being of better value. But this way it makes no difference, Whether the whole value of the goods redeemed, ſhall be held Aſſets; and the money paid for Redemption ſtand drowned therein, or that that ſum be ſtill adjudged in the hands of the Executor, as Aſſets, and only the ſurpluſage of the thing redeemed over and above the ſum paid for Redemption.

Things accrued by Covenant or Aſſumption.

IF *A.* Covenants with *B.* to make him a Leaſe of ſuch or ſuch Land, by ſuch a day; and *B.* dyeth before the day, and before any Leaſe made; now muſt *A.* make the Leaſe to the Executor of *B.* and the Leaſe ſo made to him, ſhall be in him as Executor, and conſequently as Aſſets. This is proved by the Judgment, in the Caſe between *Chapman*, and *Dalton*, in the late Queen's time. Yet I confeſs, that it is not expreſſed in the Reſolution of this Caſe, that this Leaſe ſhould be Aſſets, but that the Executors ſhould have the Term as Executors, which implyeth as much in my underſtanding; and the Declaration whereupon the Defendant demurreth, ſets forth the breach of that Covenant, to be in *retardatione executionis teſtamenti*; ſo as the damages thereupon recovered, *viz.* 3301. were Aſſets, and conſequently alſo ſhould the Term have bin, in lieu and recompence whereof theſe damages were given. The like Law, if *A.* aſſume upon good conſideration, to deliver in to *B.* by ſuch a day, 20 quarters of Malt, or ſo many Loads of *Plow. Com.*

Coals or Wood, or any other Wares or Marchandize, and this is not performed in the life of *B.* but after to his Executor; it shall be to him as Executor, and shall be Assets in his hands, as well as the money recovered in damages, for not performing, should have been.

Of things accorned by remainder, or increase.

IF a Lease be made to one for life, the remainder to his Executors for years, and he dyeth, this will be Assets in the hands of his Executors, though it were never in the Testator, as was in the latter end of the late Queen's time, resolved by three Justices, the Lord *Anderson* onely being of a contrary opinion; and there it was said, that *Cranmer*'s Case, wherein the contrary, in effect, was resolved, was of little Authority, for that there were first two Judges against two, till after *Mounson* changed his opinion, upon a conceit, that there the estate was by way of use, which could make no difference. Like Law, where a Lease for years, is by Will bequeathed to *A.* for life, and after to *B.* who dyeth before *A.* although *B.* ne-

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ver had his term in him, ſo as that he could grant or diſpoſe it; yet ſhall it reſt in his Executor as his goods, and be Aſſets. As for a remainder for years, ſo in the Teſtator, that he might grant or diſpoſe it at his pleaſure, no doubt can be thereof, though the ſame fell not in poſſeſſion to the Teſtator in his life-time; yet no ſcruple nor doubt can be, but that this is Aſſets to the Executor, even whilſt it continues a remainder, and before it falleth into poſſeſſion, becauſe it is preſently valuable and vendible.

Nor much of other nature to theſe, are the Caſes, where the Executor merchandizing with the goods of his Teſtator, maketh gain thereof. 11 *H.* 6. 35. *per* Babington.

So if the Sheep, or other Cattel of the Teſtator do breed, *viz.* bear Lambs, Calves, Colts, &c. after the Teſtator's death, even theſe which were never in the Teſtator, ſhall yet be Aſſets, and ſo the Wooll growing upon the ſheep after the Teſtator's death. But there is one Caſe worth the conſideration, and worthy of ſome doubt, as I think, and that is this; One leaveth to the Executor a Leaſe for years of Land, worth 20 pound by the year, and the Executor

keeping this in his own hands, one year after the Teſtators death, doth make thereof thirty pound in clear gain, above all charges; now whether, as to a Creditor, this whole thirty pound ſhall be Aſſets, or only twenty pound; and the Caſe ſimply thus put, ſhall be underſtood of an occupying and manuring without any ſtock of the Teſtators; and then if the Executor did ſtock it with his own Sheep, or other Cattel, as he muſt have born the loſſe by rot or death, ſo is it reaſon, that if the manurants prove gainfull, he reap the fruits thereof in recompence of his adventure, and of his induſtry, skill, and good Husbandry. But if the Teſtators ſtock of Sheep and Cattel were (as of neceſſity, or for the better advantage of the Teſtators Eſtate) continued upon the Leaſe Land, then is it reaſon, that the gain or loſſe, whatſoever of them God ſendeth, do redound to the Teſtators Eſtate. Like Law (as I think) if an Executor, finding that he cannot inſtantly after the Teſtators death let the Leaſe Land near the value, ſhall therefore buy ſeed-Corn, & hire the plowing, *&c.* But it may be ſaid, that the Leaſe hath one entire valuation at the firſt, upon the

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appraiſement. To this I anſwer, firſt, that the value upon the appraiſement is not binding, nor much reſpected at the Common Law; if it be too high, it ſhall not prejudice the Executor; if too low, ſhall not advantage him; but the very value found by Jury, when it comes in queſtion, whether the Executor have fully adminiſtred, or have Aſſets or not, is that which is binding. Next I ſay, that if a long Leaſe come to Executors, of Land worth an hundred pound by year, and no ſale is made thereof by the ſpace of a year or more: now the terme continuing of the like value, as at firſt, it is no reaſon but this hundred pound raiſed the firſt year, ſhould go towards the payment of debts and Legacies, rather then any of them ſhould be unpaid. Theſe things, I mean the knowledge of them, are uſefull two wayes, *viz.* Firſt, to give light to Executors, to diſcern what unto them of right pertains: Next, to ſhew unto Creditors and Legatees, what, and how far things ſhall be Aſſets, that is to ſay, goods to enable, charge, and bind Executors to pay debts nd Legacies. For whatſoever any of theſe wayes cometh to the Executors from their Teſtator, or

is recovered by any of theſe Actions, ſhall be in their hands Aſſets, the coſt and charges of recovering deducted.

CHAP. VII.

What manner of Intereſt an Executor hath in his Teſtators Goods and Chattels, and how different from the common Intereſt which they or others have in their own proper goods.

THE Intereſt which an Executor hath (as Executor) in the goods of his Teſtator, is much different from the abſolute, proper and ordinary Intereſt which every one hath in his own proper goods, as may well appear in and by theſe points: 1. Although a ſtranger take away theſe goods, the Action of Treſpaſſe for the Executor, is of generall form, *Quare bona ſua cepit*, calling them his goods; whereas a man outlawed in Debt, *&c.* or convict or attainted of Felony or Treaſon, forfeiteth all his own goods; yet theſe which he hath as Executor, ſhall not be forfeited. If a Villein be made Executor, his Lord cannot

24 E 3. f 35.

52 H. 6. 34.

not take theſe goods, though he may take all the Villeins own goods: and for taking ſuch goods, or for a debt due to the Teſtator, a Villein may ſue his Lord. Nay, if the Executor grant all his goods, ſome good opinion hath been, that theſe which he hath as Executor, ſhould not paſſe; yea the Lord *Dyer* ſo held in the late Queens time, with this difference, *viz.* Where the Grantor is named Executor in the Grant, there the goods which he hath as Executor ſhould paſſe; but otherwiſe, if he be not named Executor in the Grant. And that this opinion is probable, will further appear by that which followeth.

Lit. tit. Villenage 41, 42. 10 E. 4. *f.* 1. Yet 19 H. 6. *f.* 15. A releaſe of all Actions by an Executor ext nds actions as Executor. But *Frowick* is againſt it in 2 *Hen* 7. *Kel.* 64.

Secondly, the Executor cannot by Will give or bequeath the Goods he hath as Executor; and if he die inteſtate, and Adminiſtration of all his goods is committed to *I.D.* yet hath he nothing to do with the goods which the Inteſtate had as Executor to his Teſtator: Thus all his goods reacheth not to his goods as Executor.

Thirdly, whereas a mans goods ſtand liable to the payment of his debts, both in his life-time and after; the goods which a man hath as Executor, are not to be taken

See theſe ſo reſolved in *Pl. Com.* 5. 25. *inter Bramby & Grant am.* P. 20 *Eliz.*

taken in execution for his own debts, either upon a Recognizance, Statute, or Judgment had against him. And if such a one die indebted, leaving to his Executor much goods, which he had as Executor; these are not Assets in his hands, lyable to the payment of his debts, but only for the payment of the first Testators Debts or Legacies. Therefore a *Quo minus* brought by an Executor, shewing that he was not able to pay the Kings debt, because the Defendant detained from him an hundred pound, which he owed him as Executor to *I. S.* was overthrown; for that it could not be intended, saith the Book, that the Kings debt could be satisfied with that which the Plaintiff should recover and receive as Executor. Whereas a Woman being possessed of any Chattels personal, *viz.* moveable goods, all be devested out of her into her Husband by her marriage, so as if he die, and she over-live, they be not hers again, but her Husbands Executors or Administrators; and if she die, all be the Husbands, without being Executor to his Wife. It is not so of the goods which she hath as Executor; these still remain in and to her, if her Husband die: and

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if ſhe her ſelf die, for that ſhe hath them as it were in anothers right, *viz.* as ſhe repreſents the perſon of her Teſtator, her Husband ſhall not have them, if he be not his Wifes Executor, and ſo Executor to her Teſtator.

Laſtly, whereas the Writ of Treſpaſs ſeemes to make no difference between ones own goods, and thoſe he hath as Executor, that being a poſſeſſory Action or Suit grounded upon the poſſeſſion, yet come to an Action of Debt, which more taſtes and participates of the right, and there are they differenced: for where for my own debt, when I ſue, the Writ ſaith, *Debet & detinet, viz.* that the Defendant owes me, and detains from me that ſumme. Yet when I ſue as *Executor*, the Writ ſaith not *debet*, he doth owe me, but *detinet* onely, he detains from me, as admitting that he is not Debtor to me, though he ſhould pay me; and ſo where I am ſued as *Executor*, the Writ makes me not a Debtor, but a detainer; Otherwiſe, where in my own right, I owe, and I am ſued for a Debt; Accordingly, where Judgment in an Action of debt is given againſt one as *Executor*, it is not generally that the Plaintiff ſhall

This may be in his name only out of whoſe poſſeſſion the goods were taken.

Co. l. 5. f. 31

shall recover against him; but he shall recover of the goods of the Testator; and therefore upon this Judgment, no *Capias* lyeth against him, to inforce him to pay by Arrest of his Body, because he is not properly Debtor: But if after it be returned, that he hath wasted the Testator's Goods, out of which the said Debt shall be satisfied, then he having made himself a Debtor, a *Capias ad satisfaciendum* shall be awarded against him, and then he shall be taken in Execution. So also in some Cases of false Plea pleaded; for where the Judgment is *de bonis propriis*, the Plaintiff may have a *Capias ad satisfaciendum*, and that Judgment is in divers Cases for the damages, although not in many for the principal. As for the *Capias* before Judgment, in the mean *Process* against an Executor, that is because of his Contumacy in not appearing upon the former Process.

3. H. 6. 45.

The reason of this different interest between an Executor and another, or between the same man's having Goods as Executor, and others in his own right; as also of the different manner of ones being indebted as Executor, and otherwise in his own right, is well expressed by

by the Lord *Cook* in *Pinchons* Caſe, *viz.* Firſt, that the goods which one hath as Executor, he hath not in his own right, but in *auter droit*, that is, in the right of another, meaning his Teſtator. Secondly, that Executors are but the Miniſters and Diſpenſers, or Diſtributers of their Teſtators Goods.

Co *lib* 6. 88. b. See this alſo *Plow.* com. 5. 20. a.

Of alteration of property in the Executors hands, ſo as ſome goods become his own, which he had as Executor.

TO this head or Chapter, treating of the difference between the intereſt in Goods as Executor, and others had meerly in ones own right, and to his own uſe, it is not impertinent to conſider how that which one hath at the firſt as Executor, may be changed in property, and become the Executors own to his own uſe, as other his goods, which he had not as Executor. Here let us firſt conſider of ready money left by the Teſtator; for ſince pieces of money, *viz.* ſhillings, groats, pieces, and half pieces of gold, cannot be known one from the other, it muſt needs follow, that theſe coming to an Executor from the Teſtator, muſt in ſome

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ſort be altered in property, ſo as though the *Executor* ſhall be ſaid to have ſo much in money or value, yet can it not be diſcerned which money in his houſe was his Teſtators, and which his own. Conſequently the Sheriff upon the *fieri facias*, for a Creditor, who hath recovered againſt the *Executor* a debt owing by the Teſtator, cannot take away mony in execution as the Teſtators, in my opinion; *Quære*, if thereupon a *devaſtavit* ſhall be returned, or what ſhall be done?

But what if the Teſtator were indebted to the *Executor*, or if the *Executor* not having ready mony of the Teſtators, or otherwiſe, ſhall pay a debt of the Teſtators with his own mony, what ſhall we ſay of the Converſion or alteration of ſome of the goods from being his as Executor, to be his meerly in his own right? Hereof I have ſhewed elſewhere my conceiving, which is briefly thus; That except either he have in his hands money of the Teſtators, (for of that it is eaſie to make a proportionable change) or unleſs the ſumme to him owing from his Teſtator, or by him paid for his Teſtator, amount to the full value of all the Teſtators Goods in his hands, or do exceed

2 El Dy. 185 This divers Books affirm, ſect. 20 H. 4. & Keiv. Rep. 19. & 2, 3. El. Dy. 7. 6 H. 8. Dyer fol 2. a.

ceed the ſame, no alteration can be, until ſome election or Declaration by the Executor made, which of the goods, not exceeding the debt unto him, he will have to be his own: For where the Teſtator's goods exceed this debt to him, the property of all cannot be changed, and of what part ſhall the Law adjudge the change, till choice by the Executor? It is good therefore for him to do as the Mother-Guardian in Soccage, who is to endow her ſelf, calling her Neighbors, and expreſſing to them, which part of the Land ſhe will have for her Dower. So let the Executor do. But let him take heed that his Election or Declaration exceed not his Debt, leſt it be void. And that ſuch particular election is to be made, ſeems to me proved by the Caſe of 21 *E.* 4. *fol.* 21. where the payment of money, and detaining or taking of a Horſe of the Teſtator's, is mentioned. But *Choke* there ſays, this cannot be done without the Ordinarie's Aſſent. And the Reporter thinks, though the Ordinary do aſſent, yet the property ſhall not be turned into the Executor as his owne.

Plow. 554. So of a Legacy in money given to the Executor.

See 2. 3 *El. Dyer* 117.

2. Another alteration is of the profits of a Leaſe come to the Executors from the Teſtator; For ſince no more thereof ſhall ſtand in the Executor as Aſſets, then ſo much only as exceeds the yearly value, according to the reſolution in *Hargraves* Caſe, it muſt needs follow, that the reſidue of the profits muſt be the Executors, he paying the Rent out of his own purſe, Co. l. f. 31 b. as that Caſe reſolves in conſequence, *viz.* that he ſhall be ſued for it in the *debet*, and in the *detinet* onely as for the Rent due before the death of the Teſtator. Thus though he have the Leaſe as Executor, yet part of the profits are meerly his own, not as Executor.

And looking back upon this Caſe, we may diſcern a neceſſity ſometimes of the Executors paying with his own money for his Teſtators debt, as where the Teſtator being to pay a Rent at *Michaelmas*, or our Lady-day, dies a day or two before; or, to put it more clearly, a day or two after the Feaſt, not leaving any goods to pay the Rent, other then the future profits of the Leaſe. Here, unleſs the Executor will forfeit the Leaſe, he muſt lay out of his own mony.

Now

Now if in this and other like Caſes he could not do this until he had under Seal, or by act in the Court Spiritual, an aſſent of the Ordinary, it would be an extraordinary trouble to Executors.

I finde alſo *tempore Hen.* 7. another mean of altering property (to wit) where a *Fieri Facias* comes to the Sheriff to ſell, or leavy a debt of the Teſtators goods; now ſaith the Book, may the Executor buy theſe goods of the Sheriff, as well as another; and if he do, the property which he had as Executor ſhall be turned into a property *in jure proprio.* 20 H. 7. 5. a.

If an Executor amongſt his Teſtators goods, find and take ſome, not his; and after theſe being claimed by the owner, who left them by the Cuſtody of the Teſtator, the Executor not crediting the claim, ſtill keeps them, and the owner thereupon recovers dammages in an action of treſpaſs, or of *Trover* and *Converſion*; now (and ſo in all other like Caſes) are theſe goods become the Treſpaſſors in property, becauſe he hath paid for them; therefore it is not ſtrange, if in like manner an Executor paying out of his own purſe, for, or in lieu of the Teſtators 20 H. 7. Kelw. Ca. 58

goods, have ſo much of them (where no certainty) changed in property and become his own. This is but put as an inſtance underſtood with the exceptions and cautions precedent.

CHAP. VIII.

Of ſome caſes and queſtions between the Executor and the Heire.

21 *H.* 6. 30. If other goods taken among them he is excuſed. 21 *H.* 7. 25. *Vide l. Entr.* 640. It is ſo pleaded.

THe Executor may in convenient time after the Teſtator's death enter into the houſe deſcended to the Heire, for the removing and taking away of the goods, ſo as the door be open; or at leaſt the key be in the door: and this I underſtand of the door of each room; for although the door of entrance into Hall and Parlor be open, the Executor cannot by that juſtifie the breaking open of the door of any Chamber to take goods there, but onely may take thoſe in the rooms which be open; and this is proved, as to me it ſeems, by the Caſe of the cheſt with Evidences, which, ſaith the Booke, the Executor may

may take and put out the Deeds, delivering them to the Heir, *viz*, the cheſt being unlocked, as I underſtand it. Now a chamber or other room within a houſe locked is an incloſure of better reſpect then a cheſt. But if the goods be not removed within convenient time, the heir may diſtrain them as *damage feaſant*.

43 *E.* 3. 24. Bro. 145. makes a *Que.* if it be locked.

Plow. Com. 280.

Where the Teſtator recovered land and damages, or a deed and damages, he dying before Execution, the Heir ſhall have execution for the Land or Deed, and the Executor for the Damages: but *temp. Edward* the 4. it is ſaid, that untill the Heir ſue a *Scire Facias* the Executor cannot ſue execution for the damages.

43 *Ed.* 3. 2. 10 *Ed.* 4. 5, 6. Of the Deed Execution firſt.

If a Creditor be made Executor by his Debtor, and pay himſelf part out of the Goods, he cannot ſue the Heire for the reſt, becauſe the debt cannot be apportioned; but otherwiſe, he may, ſaith the Book: yet *Quere*, if he do take upon him the Executorſhip, and have goods ſufficient to pay all.

12 *H.* 4.

If a debt be recovered againſt one who dieth before execution ſued, leaving goods ſufficient to ſatisfie, now ſhall not the Land deſcended to the Heire be charged

7 *H.* 4. f. 31. See *Bro. Ex.* 124.

ged therewith, nor by like reason, any land conveyed after Judgment.

Co. l. 3. f. 90. 91. To like purpose see more, *Littl.* f. 77. b. 2 *El. Dyer* 281. *Plow. comm.* 291. 21 *H.* 7. 4.

See a good difference where land is conveyed, upon condition of payment to the Vendor, his Heirs or Assignes, and he dieth before the time, and where it is to be payd to the Vendee, his Heirs or Assignes, and he dieth; in the first case, payment shall be to the *Executors*, but not in the other.

What things pertain to the Heir, and what to the *Executor* is before shewed. As for *Frowick's* opinion, that where goods be mortgaged upon condition, that if the Heir or *Executor* pay, *&c.* here if the Heir make payment, he should have the Goods. I see not how that can be.

A *Directory* for the following Chapter.

A. *All (as but one) represent the Testators person, and must joyn and be joyned in suit,* & è contra.

B. *Where one alone must answer suit, and how.*

C. *When they differ in Plea, the best shall be*

be taken, but one may confess alone.

D. *One as well as all, hath, may give assent, or release the whole.*

E. *One cannot give, nor release to another, nor divide.*

F. *The possession of one is the possession of all, to what purpose.*

G. *If the survivor die Intestate, the Testator is Intestate, though the other Executor left an Executor.*

H. *Executor included in the person of the Testator, and represents it. Is his Assignee; all one, & è contra.*

I. *What change by death of the Testator, touching proceeding in suit.*

K. *Proceed to, or in Execution; where without* Scire Facias.

M. *Whether the Executor stand in his own quality, or his Testators.*

N. *Where one alone may sue.*

O. *In suit for them, such as will not joyn, shall be severed, and the other may sue and prosecute alone;* consequents inde.

P. *Death of one Executor, Plaintiff or Defendant; where abates Writ.*

CHAP. IX.

How Executors ſtand between themſelves, and in repreſentation of, or relation to, the Teſtator; as his Aſſignee or Deputy, or as the ſame perſon with him; and where, and to what purpoſe, as other perſons.

Are as one perſon; therefore cannot plead ſeveral pleas in abatement. 37 *H.* 6. 17. 39 *H.* 6. *l.* 4. 38 *E.* . . . *Bro.* Ex. 13. *Bro.* Ex. 20, 21.

Therefore one Executor ſued, if he pleads that there is another Executor not ſued, muſt plead that he did adminiſter. 9 *H.* 6. 44. *Bro.* 13. 33 *H.* 6. 38. *Bro.* 20. 32 *E.* 3. *Quid juris clamat.* 5.

FIrſt, all of them do repreſent the perſon of the Teſtator, and therefore muſt they all joyne in ſute againſt others, and in ſuite by others they muſt be all made Defendants, or at leaſt ſo many of them as doe Adminiſter: for though the Executors themſelves muſt take notice by the Will, how many Executors there be, and muſt frame their ſuit accordingly, Creditors and Strangers need not take notice of any more then do Adminiſter, and Execute the Office of Executors. For this reaſon, as I take it, in the time of King *Edward* the third, where two Executors were of a terme, and the reverſion was granted by Fine, mentioning but one termer, and thereupon a *Quid juris clamat*

clamat accordingly brought against that one executor; this was held good enough, though the other executor was not named in the Suit; belike, because that one (who indeed was the Testator's Wife) did only occupy the land, and take the profits thereof; for else, since all the Executors do represent the Testators person, all must have been named. Therefore did the Judges resolve in the time of *Hen.* 4 that where a Lessee for years made two Executors, and one of them was distrained by the Lord for Rent, who avowed upon the Lessor, that Executor should have aid of his fellow Executor, to the end that both might have aide of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator, as one person (for so speakes the Parliament) It was enacted in the time of *Edward* the 3. that the Executors, though never so many, shall have but one essoyn, neither before appearance nor after, because their Testator, whose person they represent, could have had no more.

13 *H.* 4. Aid. 186.

A.

9 *Ed.* 3. c. 3. A.

It is further also enacted by the said Statute, that where two or three Executors or more be, they being sued in an Action

B

But not, if he appear at the ſummons 1 E. 4. 1. 14 H. 4 f. 11. But the Plaintiff muſt declare againſt all, he need not but he may admit another to appear and plead after. 7 H. 4. 12. But proceſs muſt be continued againſt all. 7 H. 6. 35. Executors of Executors by equity. 30 H 6. 45. Bro, Exec. 99 28 H 6. f. 4 24 H. 4. 23. 24. So negatively. 22 H. 6. f. 1. 28 H. 6. f 4. 3 H. 6. 35. a 39 E. 3. 5. There it is not meerly as Executors; it is out of the Stat. 11 H. 4. 63. As it in *deb. & det.*

action of debt, though all do not appear; yet ſuch one of them or more as do, or doth, appear at the Grand Diſtreſs, ſhall anſwer alone without his Companions. And this Statute hath been taken by equity in three reſpects.

Firſt, touching the perſons: that it ſhall extend not to Executors onely, but alſo to Executors of Executors, yea, to Adminiſtrators alſo, though the Stat. ſpeak onely of Executors.

Secondly, touching the Actions; whereas the Stat. ſpeaks onely of the Action of debt, it is taken by equity to extend to other Actions, as the Writ *de rationabili parte bonorum*; and *detinue*; yet perhaps this latter Action will be ſaid not to be maintainable againſt *Executors*, for their Teſtators act, but for their own onely; But we yet are not come ſo farre as to determine what is maintainable; but whether before all the Executors do appear, he, or they which have appeared ſhall be put to anſwer; and ſo to bring it to *deciſion*, whether the Action be maintainable or not. I think alſo, that in the Action of Covenant, and all other Actions againſt Executors, as Executors, he which appeareth, muſt

must answer without his Companions, though the greater opinion in the *Quadrageſimes*, were contrary touching the action of Covenant. But as for the *ſubpœna* against the Executors, which is to make them to answer to a ſuit in equity; that hath been *temp. E.* 4. taken to be out of the reach and intent of the Statute. So also of the *Latitat* in the King's Bench, as was held in the ſame Kings time: except all the Executors, making up the whole repreſentative body of the Teſtator, be in the cuſtody of the Marſhall, one or more of them who are there, ſhall not be inforced to anſwer; and ſo was it alſo lately held in the Kings Bench, where Maſter Juſtice *Houghton* gave an excellent reaſon that this Caſe is out of the ſaid Statute, *viz.* for that this Writ doth not mention any debt, or name the Defendants Executors.

B Cont. 47 E. 3. 21. So 7 E. 4. 10, 21 3 H. 4. 20. In *ſet. fac.* upon a pardon by Defendant outlawed at their ſuit, 47 E. 3. 22. Only *Fenold* in the affirmative. 8 E. 4, 5. 9 E. 4. 12, 13.

B 20 *vel* 21. *Fac. teſte.*

Thirdly and laſtly, that Statute is extended by equity to other Writs or Proceſs; for where the Statute ſpeaks onely of the Grand diſtreſſe, and the Executors appearing thereupon; It hath been many times ruled, that when he or they appear upon the Attachment, *Capias* or *Exigent*, anſwer muſt be, though the

B.

1 E. 4. 1. 40 E. 3. 1.

the reſt appear not; for ſo the word Diſtreſs is taken for all compulſory meanes, or enforcement of appearance. But where the Statute reacheth not, *viz.* when the Proceſs is determined againſt one or more, as by Outlawry, *&c.* there the reſt muſt anſwer by the rules of the Common-Law; Except it be in the caſe of Husband and Wife Executor, for there the Wife cannot anſwer without her Husband, nor doubtleſs can he without her, where ſhe and not he is Executor; but where both be Executors, there he may anſwer without her, but not ſhe without him. When Executors as Defendants have appeared, if any one of them will confeſs the Action, this bindes and concludes the reſt; but if one will plead one plea, and the other another, that, ſay ſome, ſhall be received, which is beſt for the Teſtators ſtate; ſo where they ſue, ſuch as will not proſecute, ſhall be ſevered, and the reſt without them may proceed; and in like manner where they pray to be received to defend their term, and one of them after makes

B 11 *H.* 4. 63.

C Or if but one appear, 28 *H.* 6. 364 Judgment againſt all. See 9 *E.* 4. 12, 13, 14. Where B who is not Executor is joyntly ſued with *A* and *B* confeſſeth, 41 *H.* 7. 25. Yet 7 *E.* 4. 7 they may ſever in pleas not dilatory.

C 7 *H.* 6 f. 6. *per Cotteſmore.* If they recover, and one of them prayes a *cap. ad ſat.* and the other a *Fieri fac.* the firſt, as beſt, ſhall be granted, 3 *H.* 4. 10. *Bro.* 44. So where the Defendant Outlawed at the Suit of two Executors, and upon the *Scire Facias* after his pardon, but one appeares, 21 *H.* 7. 25. 9 *E.* 4. 12 14.

D

default;

default; it ſhall not be the default of all, but the reſt; or he, if it be but one who appeares, ſhall be received to uphold the defence of the term.

Thirdly, ſo where they plead a Releaſe to the Teſtator or themſelves, one after making default; this ſhall not be, nor make a total default in the Executors, to induce a judgment or condemnation againſt them. Yet in truth, each Executor hath the whole of the Teſtators goods and Chattels, be they Real, or Perſonal, and each may ſell or give the whole. One of them cannot give, nor releaſe to the other his Intereſt, and if he do, it is void, and he who releaſeth, ſhall ſtill have as much intereſt, as he to whom he releaſed, becauſe each had the whole before; upon this reaſon long ſince, where one of the two Executors releaſed but his part of a debt, it was held that the whole was diſcharged: and ſo if one Executor grant his part of the Teſtators goods, all paſſeth, and nothing is left to the other, for that each hath the whole, and there be no parts or moyeties between Executors. Therefore, alſo though a Leaſe for a thouſand years, of a thouſand Acres of Land come to two Exe-

21 *E.* 3. 13. 27 *H.* 8. 21, 22.

D E

C

If an horſe come to four Executors, each hath an horſe, and yet all four have but one.

E Executors or more, no partition or division can be made between them, becauſe it is not between them, as between joynt Leſſees of Land, where each hath but a moyety in Intereſt, though poſſeſſion of or through the whole. Amidſt D Executors each hath the whole, & therefore if he grant his part, he grants the whole. But one *Executor* may demiſe, or grant the moyety of the Land for the whole terme, and ſo may the other do; and this way they may ſettle in friends or others truſted for them, a moyety for each; either in ſeveral or undivided; but one of them cannot make a Leaſe to the other of any part, for he had the whole, nor can one ſue the other as Executor: yet if the Teſtator deviſe to one of his Executors, all his goods, after ſuch debts and Legacies ſatisfied, there, after *6 H. 7. 5.* thoſe ſatisfied, the Executor may take the Goods, and maintain an Action of Treſpaſſe againſt the other Executor, if he take them from him, and conſequently an Action of *Detinue*, for keeping or detaining them: but this is as Legatee, his own aſſent perfecting the Legacy.

The poſſeſſion of one Executor is the poſ-

poſſeſſion of all the reſt; ſo, as if one appearing to a Suit, and the other making default, in whoſe hands all the goods be which are not adminiſtred; if, I ſay, here he that appeares, pleads that he hath nothing in his hands, this ſhall be found againſt him; for whatſoever any of the Co-executors hath, he alſo hath, and is in his poſſeſſion, and ſo ſhall the Creditor recover, and have judgment to be ſatisfied out of the Teſtators goods, as in his hands. And therefore if goods be taken from one, all may maintain an Action of Treſpaſs thereupon; for the poſſeſſion of one, is the poſſeſſion of all. But the poſſeſſion of one ſhall not be ſo the poſſeſſion of all, as to charge the others own goods, whereof more elſewhere.

14 *H.* 4. 12. *Bro.* 12. F

All muſt ſue, 19 *H.* 6. 65. *cont.* 24 *E.* 3. 40. & 42 *E.* 3. 26. It may be in his name onely from whom taken, nor need he be named Executor. *Bro. Exe.* 31. 39 *H.* 6. 45. F G

Where two Executors be made, the one making a Will and Executors, and dying, if the other dye after Inteſtate; now ſhall not the *Executor* of him who firſt dyed, be *Executor* to the firſt Teſtator, but he is dead Inteſtate, becauſe the ſurviving *Executor* is ſo dead; and in him the *Executorſhip* was wholly and ſoly ſetled by the death of his fellow before him: So Adminiſtration *de bonis non admin.* ſhall be committed.

32 *H.* 8. *Bro. Exe.* 149. 39 *H.* 6. 45.

The

The Executors or Executor, if but one, so represents the person of his Testator, that he is in Law his Assignee by the very making of him Executor; so as if one Covenant to make a Lease to *I. S.* and his Assignes by such a time, and *I. S.* dieth before that time, and before the Lease made, now must the Lease be made to his Executors as his Assignee, representing his person; so also, in a condition, to pay the Feoffor or his Assignee: yet a Lease to *A* and his Assignes during the life of *B*, shall not go to the Executors of *A*. So, where in a general pardon by Parliament, there is an exception of persons outlawed after judgment, the person so out-lawed, shall satisfie the Creditor, who hath out-lawed him. If the Out-law die before this done, his Executor, as representing his person, may make satisfaction, and so make the benefit of the pardon to extend to his Testator, for saving his goods, as if himself had satisfied his Creditor, though he left him unsatisfied, when he left the world *& diem obiit extremum.* Yet where *A.* sold Land to *B.* upon *Proviso*, that if he payed to *B.* his Heirs or Assignes, &c. *B.* died, *A* payed at the day to his Execu-

tor,

C. 9. lib. 5. f. 97. H Chapman & Daltons Case. *Plow.*

Sir *Edward Phittons* Case, *Co. lib. 2. f. 80.*

A So where the Stat. of *W. 1.* gives time for proof to him whose goods were wrested, His Executors may do it, if he die before the time. *Co. l. 5. 107. b Co. lib. 6. f. 80.*

tor, and it was doubted, that it was not good; for the word Assignee could not reach to him, being no Assignee of the Land; and where the Executor brought an Action of account upon a Receipt by the hands of the Testator, the Defendant could not be admitted to wage his Law; for that this was held a Receipt, *per autermains*; yet it is clear, that if one by Bond or Covenant tye himself to pay such a sum at such a day, not mentioning his Executor at all; yet is the Executor bound, as included in the name or person of the Testator. And where the Statute 23 of *Hen.* 8. gives the Writ of Attaint (in the course there mentioned) against the party that had Judgment, it lyeth against his Executors if he be dead; but thereof another reason is given: Where a man was bound that he would not sue upon such a Bond, and he dyed, and his Executor sued; this was held to be no forfeiture of the Bond. So where one was bound to pay ten pound within a moneth after request made to him, and he dyed before request; it sufficed not to make it to the Executor, as *Marwood* said. It was likewise held, that the Warrant of Attorney put in for the

Also Executors may have restitution for from goods, and a writ of Error, yet the Statute speakes but of the party.

A 2 El. Dy. 180. [Conte, where to to *A.* the Feoffer his Heir or Assign. Co. lib. 5. f. 97 2 Eliz. Dy. 183. 3 Eliz. Dy. 201.

H 27. *H.* 8. 16.

M. 15. & 16. Eliz.

L 34 *Eliz.* vel circiter Titherly & Lexeor. Walsh. in ban. Reg.

I 35 *H.* 8. Bro. Stat. Marchant 43.

K 2 *R.* 3. 8.

H I 15 *H.* 7. 14.

F 15 *E.* 3. Respond 1. con. upon a stat. Merchant.

K Cont. Na. br. 267. upon a Recog

I

H 30 *El.* tot. 31 in ba. reg.

Plaintiff in Debt, it sufficeth not for his Executor to bring a *Scire Facias* upon the Judgment. And if Executors sue execution upon a Statute, in the name of a Conusee, as if he were alive, this is void, and they may sue out new extent, and this they may do without any *Scire Facias*, as well as the Conusee might, if he had been alive. But by *Hussey*, Justice, If the Conusor in a Statute staple, be returned dead by the Sheriff upon the extent, a *Scire Facias* must be sued out before extent proceed; and upon a Judgment had, if the Recoverer die before execution, his Executor cannot, as himself might, sue out execution without a *Scire Facias*, as is there said. Yet if after a *Capias ad sat.* awarded, the Plaintiff die before it be executed, the Sheriff may proceed to the taking of the party, and is not subject to any Action of false Imprisonment: nay, if he suffer him to escape, he is chargeable, as *temp. Elizabeth* it was resolved upon the motion of *Anderson*; but withall it was held, that relief might be by *Audita Querela*.

Like Resolution was in the King's Bench, after some doubt by *Wray*, and the other Judges, where the Defendant died after

after a *Fieri Facias* awarded, and before it was executed, that the Sheriff might proceed upon the goods in the hands of the Executors.

But if the Defendant in an Action of Debt upon a Bond plead a Tender at the time and place of payment, and tenders the money in Court, where it rests, and then he dies, now shall not the Plaintiff have this money, because the property thereof is changed, and become the Executors, as was held in the Common-Pleas; but he is put to a new Suit against the Executor.

Yet where Judgment is once given in a Writ of Partition, for a Termer, or in a Writ of Account, if the Plaintiff die before the second Judgment needful in both cases, the Executor is not put to a new Suit; but may proceed by *Scire Facias* upon the former Judgment, as the L. *Anderson* held, upon the motion of *Fenner* Serjeant. Though before we found the Executor not in points penal, all one with the Testator; yet, in point beneficial, the Testator includes him in some Cases; as where an Abbot granted to his Lessee to take Estovers in anothers ground, it was held, that his Executor, though

32 *El. vel circiter.* I

Pasch. 28. H

not named, ſhould enjoy this, during the term, as well as himſelf ſhould have done. And whereas the Statute 23 of *Henry* the 8. gives coſts to a Defendant againſt a Plaintiff, ſuing for a wrong, or breach of promiſe, or the like, done to the Plaintiff, againſt whom it paſſe h by Verdict or Non-ſuit; it hath been reſolved, that an Executor ſuing upon ſuch wrong, or breach of Contract to his Teſtator made, ſhould not pay coſts, becauſe he is another perſon then the Teſtator; and ſo is it uſual in experience. But if in ſuch Suit, the Attorney of the Executor misbehave himſelf towards him, and for this the Executor ſueth him, here if it paſs againſt him in manner as aforeſaid, he ſhall pay coſts, becauſe this was a Suit for a wrong done to himſelf.

Trin. 36 El. it ba. reg. *H M.*

Pa. 41 Eliz. in com. ba.

If *A.* recover a Debt as Executor of *J. S.* and makes *B.* his Executor, and dies before Execution ſued, *B.* is not put to new Suit, but may have execution upon that Judgment. But if *A.* or *B.* dyed Inteſtate, now could none as Adminiſtrator to either of them, nor as Adminiſtrator of *J. S.* have execution of this Judgment; for the former hath no intereſt in

H 28 *H.* 8.

in any thing pertaining to *J. S.* and the latter cometh to Title above the Judgment, *viz.* as immediate Administrator to *J. S.* who is now dead intestate: and derives no Title from the Executor who recovered.

If a Conusee have a Certificate into the *Chancery*, upon a Statute, and then dies before extent taken out, his Executor is put to a new Certificate, and for obtaining of it, must make Affidavit, that no extent hath yet been taken out. 2 *El. Dy.* 180. I

If an Alien joyn with his Wife, who is Executor in a Suit for Debt, and it cometh to Issue, he shall not have tryal, *per medietatem alienig.* or *Linguæ*, as should be, if he otherwise were party to a Tryal, as was held in the Case of Doctor *Julio*. Yet if a Noble-man sue as Executor to another, not noble; he shall for his Non-suit be amerced five pound, as if he sued in his own right, as was conceived 21 *E.* 4. 77. By the same rule and reason, doubtless a Noble-man sued as Executor, shall not be arrested, nor shal any *Capias* be awarded against him for not appearing. And if any Tryal shall be of any issue, there shall be two Knights M

of the Jury, as in other Cases where a Peer is party. Likewise where the Wife is to have her convenient apparel, whereof the Executor must not bereave her, If she be a Noble-woman, it shall be answerable to her degree.

A
38 E. 3. fo 9. N If one Executor onely sell Goods of the Testator, he alone may maintain an Action of Debt for the money. So if Goods be taken out of the Possession of one Executor, he alone may maintain an Action, and that without naming himself Executor.

Some touch hath been before of Summons, and severance, whereabout be this added. If one Executor will not, or cannot conjoyn in Suit with the other, so as he is summoned and severed, now by his death, after the suit is not abated, 16 *Ed.* 2. *Fitzh.* 111. yet if he live till Judgment, he may sue Execution, say other Books, 13 *Ed.* 2. *Fitzh. Exec.* 9. 11. *R.* 2. *Priviledge* 2. Yet *Quæ.* of that, for he cannot acknowledge satisfaction, as hath been since resolved, *Mich.* 14. & 15. *Eliz. Dy.* 319. And the reason thereof being, because he is no party to the Judgment, by the same reason can he not sue Execution upon it; for how can he

P
O
3 *H.* 7. I
& 5 E 2. Fitz. bro 8 2 Conte. 38 E. 3. 13. & 2 > E. 3. tit. account 78.

he have execution, for whom there is no Judgment given? now the recovery is onely in the name of the other Executor; yea, by the ſaid laſt Book, it ſeems that after Judgment had, he cannot releaſe the Debt, becauſe it is now altered in nature, and turned in *rem judicatam*, though at any time before Judgment he might have releaſed it, as both that laſt Book ſaith, and the two precedent, *temp. Ed.* 3. *Rich.* 2. yea, in an Action of account, after Judgment had, that the Defendant ſhall account, the Releaſe of him ſevered, is a good diſcharge to the Defendant, as was reſolved 48 *Ed.* 3. 14, 15. But this is not a plenary Judgment, for nothing is recovered thereby, but another Judgment is to be had after the Account, which may be againſt the Plaintiff, ſo as this Releaſe came before any Debt or Duty adjudged. What if the Defendant be had in Execution at the Suit of the Executor, who proſecutes it, and eſcapeth; Whether may the ſevered Executor diſcharge the Sheriff or Jaylor by a Releaſe? I think he may not,

By that above is plain, that if any one of the Executor's Plaintiffs die, the

2 *H.* 4. f. 14. Writ is abated, onely where he so dying was before severed; opinions have been different, as above appears. So also is it, if one of the Defendants Executors die. Yea, if the Plaintiff Creditor sue *A. B.* and *C.* as Executors, where onely *A.* and *B.* are Executors, there by the death of *C.* the Writ abates, or falls to the ground: yet *A.* and *B.* (as I think) might have pleaded in Abatement, that they onely were Executors, traversing that *C.* was not Executor: but the Book doth not so resolve. See 46 *Eliz.* 3. *fol.* 9, 10.

P 9 E. 4 12. Bro. 34.

As *A.* and *B.* above might admit that Writ against them and *C.* So if the Writ or Suit had been against *A.* onely, and he so admit it, not pleading in Abatement, the recovery against him alone is good, 9 *E.* 4. 12.

A

21 *H.* 6. 30. M 21 E. 4. 49. 69. 13. E. 3, 14. *H.* 6. 24, 15. One that is out-lawed, or attainted in his own person, may yet sue as Executor, because this suit is in anothers right, *viz.* the Testators: But he that is excommunicate cannot proceed in suit as Executor, because none can converse with him, without being excommunicate, as a Book says. Yet doth not this Excommunication pleaded, abate or overthrow the Suit,

the ſuit, but make that the Defendant may ſtay from anſwering his ſuit until the Plaintiff be abſolved and diſcharged from his excommunication. 3 *H.* 6. 40. *Littl.* 44. *Co.* l. 81. 69. 11 *R.* 2. Excom. 25.

CHAP. X.

Of the Poſſeſſion of Executors, or their actuall having.

1. *What ſhall be ſaid ſo to come to their hands, as to charge them.*
2. *What ſhall be ſuch a getting or going from them as to excuſe them.*

WE have before conſidered what things ſhall come to Executors, and being come, ſhall be Aſſets in their hands: Now for that it is ſaid in *Reedes* Caſe, that an Executor ſhall not be charged with, or in reſpect of any other goods than thoſe which come to his hands after his taking upon him the charge of the Executorſhip: Let us now examine what ſhall be ſaid, and accounted ſuch a full and compleat coming to the hands of Executors, as ſhall make them within the *Co.* lib. 5.

reach

reach and charge of Creditors, and Legatees, *viz.* For the payment of Debts and Legacies. As touching Debts due to the Teſtator, it hath before been ſhewed, that until Judgment and Execution had, they be not Aſſets in the Executor's hands. Now then, as touching other Goods or Chattels poſſeſſory, which are of two kinds, *viz.* real and perſonal, let us put the caſe thus,

The Teſtator, at the time of his death, hath a flock of ſheep in *Cumberland*, Corn in the Barns in *Cornwall*, Bullocks in *Wales*, fat Oxen in *Buckſhire*; Money, Houſhold-ſtuff, and Plate in *London*, a Leaſe for years in *Norfolk*, and his Executor dwell at *Coventry*, *viz.* far from all theſe places, What kind of poſſeſſion ſhall the Law judge this Executor to have in every of theſe, inſtantly upon the Teſtator's death, and before he come where any of the things be, either to ſee or ſeize upon them? In all the particulars above-mentioned, the Law is all one, except the Caſe of the Leaſe for years; which if it be of Land (as is moſt uſual) then becauſe it is a ſetled and immoveable thing, the Law doth not reach to it the foot of the Executor, to

Perk. 6. b.

put

put him in actual poſſeſſion, for (*Poſſeſſio eſt quaſi pedis poſitio*) until himſelf, or ſome for him do actually enter thereupon. Nor indeed need the Law help or ſupply the want of actual poſſeſſion in this Caſe, as in the Caſe of Moveables: ſince Land cannot be carried away as goods may, and therefore is not ſubject to purloyning or imbeſilment as Moveables are. But if the Leaſe for years, were of Tythes, the Execntor, though in never ſo remote a place from them, ſhall be inſtantly upon the ſetting out thereof in actual poſſeſſion of them, ſo as he may maintain an Action of Treſpaſs againſt any ſtranger which ſhall take the Tythes ſet out, though he, nor any for him did ever before poſſeſs any of the ſaid Tythes, or came near unto them. But if the Caſe were of a Leaſe for years of a Rectory, conſiſting not onely of Tythes, but alſo of Glebe Lands, into which Entry may be made, as alſo Livery of ſeiſin in it, then it may perhaps be ſome queſtion, Whether ſuch an actual poſſeſſion in Tythes, ſhall be given by the Law to an Executor, neglecting to enter, or not entring into the Glebe-Land. And ſo I leave the conſideration of Chattels Real.

45 *E.* 3. 7.
21 *H.* 6. 43.

Touch-

9 E. 4. 10. *Plow. Com.* 281. 32 *H.* 6. 13. 14 *H.* 8. 22.

Touching things Personal, in which the Executor hath such an actual possession presently upon the Testators death, as that he may maintain an Action of Trespass against any stranger, taking them away, or spoyling them, though he nor any for him, ever came near them: whether yet this shall be such a possession in the Executors, and such a coming of these goods to their hands, as to charge them with payment of debts and Legacies, yea to make their own goods liable, instead of these, is a point worthy of consideration.

And doubtless, this throughly sifted, will prove a Case mischievous, whitherway soever the Law be taken: for first, it must be admitted, that without the Executors laying his hands actually and particularly upon the Goods in the House or Fields of the Testator, whither the Executor hath resorted; he shall be said so in possession, as to stand lyable unto the Creditors, so far as they extend in value, though after others purloyn or imbesil them. Now then, if distance of place shall make difference, where shall be the bound & limit of that distance? and if the Executor may come after

after a ſtrangers taking, or poſſeſſing of the goods, it is miſchievous to Creditors.

On the other ſide, If it ſhall be laid upon the *Executors* to anſwer for all the goods whereof the Teſtator dyed poſſeſſed, it will be miſchievous for them, and deter them from taking Executorſhip upon them, ſince much purloyning may be even of Money, Jewels, and Goods, by Servants and others, about the Teſtator, or where theſe things be. I think therefore, that if without any fraud, colluſion, or voluntary conniving on the part of the Executors, they be prevented by others of laying hold on the Teſtators Goods, ſo as that they may diſpoſe of them; eſpecially, if it cannot be known by whom they are ſo purloyned, and imbeſilled; or if they be perſons fled, or inſolvent; that then they ſhall not ſtand upon their ſcore, as Goods come to their hands, in reſpect whereof, Creditors or Legatees ſhall draw ſo much from them, even out of their own Goods, as in other Caſes, where they have no ſuch excuſe.

And of this minde I the rather am, becauſe I find the whole Realm in Parliament,

13 *H.* 6. c. liament, taking notice of such prevention of Executors, coming to the goods of their Testator, by the wrongful act and imbesilment of others, without any default in themselves. And in this Case, the Parliament hath given special remedy, *viz.* that Writs shall be directed to Sheriffs, to make open Proclamation for the appearance of the parties delinquent in the King's Bench, at the day limited, and in default thereof, they shall be attainted there of Felony, the Writ being returned executed, *viz.* Proclamation made. But note, that this Proclam. is to be made two Market daies, within twelve dayes next after the delivery of the Writ, and the last Proclamation must be fifteen dayes before the day of appearance. And these Proclamations must be made in such Cities, Burrowes, or Places (saith the Statute) not expressing what is meant by the word *Such*, and therefore meaning doubtless those in which the act of offence is committed. So that if the fact be not committed within the limits of some City, Burrow, or Market Town, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market dayes, in the place where,

&c.

&c. Now beſides other Places, even ſome Burrowes, *viz.* Towns, ſending Burgeſſes to the Parliament, have no Markets, and ſo are no places within the Act. Alſo two Executors muſt require this Writ, therefore where there is but one Executor, no relief is given by this Law, for it is penal, making Felony, and therefore ſhall not be extended by equity beyond the words. Laſtly, it extends but to the Executors of Lords and Perſons of good degree, and onely to the treſpaſſing ſervants of ſuch Perſons, not to other ſtrangers, purloyning the goods. But now who ſhall be ſaid to be Perſons of good degree, not being Lords, I will not much labour to decide, the rather, becauſe I have not heard, nor read, to my remembrance, of any Action brought upon this Statute; but I think that good degree muſt ſtay either at a Knight, being the loweſt dignity, or at a Gentleman, being a degree of Worſhip, as elſewhere is ſhewed, and not ſtop any lower.

And the ſaid Statute ſeemes in ſome ſort to imply an opinion this way, which I incline to, in that it expreſſeth this purloyning to be an impediment of the Execution

cution of the Will, whereas if the Executors ſhall anſwer and make good to Creditors and Legatees, out of their own ſtate and goods, for theſe imbeſilled, the Execution of the Will is not hindered, but the Executors are damnified in their own private value: yet it may be ſaid on the other ſide, that ſome things given in *ſpecie* by the Will, ſuch a piece of Plate, ſuch a Furniture of a Bed or Chamber, ſuch a Jewel may be purloyned, ſo that the Legatees can never have them; and conſequently, the Execution of the Will be hindered, though ſome recompence be made by the *Executors*: but how theſe Legatees ſhall recover recompence in ſuch Caſes; for that Legacies are not to be recovered by Suit at the Common-Law, I muſt leave to the Profeſſors of the Common or Civil Law to inform. But if the *Executor* be of ſecret aſſent to this imbezilment, whereof even the forbearance to ſue for the recovery of the things, or the value of them in damages, if known where they or the imbezillers be, is a ſhrewd evidence, or proof. Then ſhall the *Executor* be adjudged an haver of them, and ſo ſtand charged as having them: for, *Pro poſſeſſore habetur qui dolo*

dolo desiit possidere. And if in any Case the taker, by prevention from the Executor, before his knowledge (perhaps) of the Testator's death, or at least, before his possibility of repair to the place where the goods were, to put them in sure Custody; if, I say, such Actor keep these goods from falling upon the shoulders of the Executor, they shall surely fall upon himself, and make him chargeable at the Creditor's Suit, as an Executor of his own wrong.

Of goods lost by, or gotten from Executors.

But put we the case (for thereunto shall be our next step) that goods come fully into *Executors* possession and hands, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their own estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our Learning touching escapes of persons, taken in Execution and imprisoned, if such be rescued by Alien enemies, the Sheriff or Goalor shall not answer out of his own goods for this debt; otherwise, 33 H. 6. 1. 10 E. 4. 2, 3. 7 Eliz. Dyer 241.

if it be done by Subjects, against whom remedy is to be had by the course of Justice; and so should I think it to be touching Executors, *viz.* That if enemies landing (as near the Sea-coast may easily, and often happen) shall take away Cattel, or Goods, from an Executor, hereby he shall be excused; contrariwise ordinarily, if the ereption, or direption be by Subjects known, and thereby actionable. Another difference I shall think may probably be taken from the rules of our learning, touching Bailment. If *A.* deliver goods to *B.* to keep as his own, or generally, *viz.* without any special undertaking by *B.* to keep them safely, and without any money or other valuable consideration, given for the safe custody; here, if *B.* be robbed of them, he shall not make satisfaction to *A.* for them; and so if they be stoln from a Servant or Factor. But if they be taken away by a known Trespasser, not feloniously; some opinion hath been, that the Keeper shall make recompence, because he hath remedy for recompence, or satisfaction from the Trespasser: yet of this latter I should doubt, because *A.* himself, as well as *B.* may have this Action

Vide 29 Ass. p. 28. 8 E. 2. *Fitz. Detin.* 59. 9 E. 4. 90. 13 H. 7. 4. Co. lib. 4. fol. 83, 84.

on

on for damages against the Trespasser. Now an Executor is of the nature of such an one, having the custody of another man's goods; and I have seen in a Manuscript entire, the Writ of Trespass by the Executor, expressing goods of the Testator, in the custody of the Executor to be taken from him: therefore me thinks he should no otherwise be charged than *B.* to whom goods were, as above is said, delivered to be kept. For the Executor haply shall have no benefit nor advantage by the Executorship, all the goods not sufficing, perhaps, to pay Debts and Legacies, which is the state we most think of, *viz.* Where goods want to pay Debts and Legacies; for where there wants not, the Question needs not be made. Yet a Servant or Factor, who hath Wages for his Service, is not thereby made liable to satisfie for things in his custody stoln, because he hath not for this particular custody, any compensation; so of an *Executor*, if perhaps, benefit might accrue to him by the Executorship, as haply the discharge of a Debt owing by himself, &c. Other Cases there be, wherein the *Executor* will stand more clearly discharged. As

In custodia sua exiſtit.

if the Teſtator left a Leaſe for years, ſtate, by extent, Wardſhip, or other Goods, whereto he had but a defeaſible title, and they be evicted after his death. So if he left a Ship at the Sea, with much Goods and Merchandiſes, which are drowned in the return, never ariving in ſafety.

So alſo if he left a flock of ſheep, tainted with the rot, which dye ſhortly after him, in none of theſe three Caſes, doubtleſs ſhall the loſs fall upon the Executor. But to put a Caſe of more doubt, What if a Leaſe for years come to an Executor, ſubject to a Condition for payment of Rent, or a ſum in groſs, and the Executor fails in payment, Whether ſhall this loſs fall upon the Executor to be made good to Creditors, or Legatees out of his own ſubſtance, or not?

To this I muſt anſwer, by this diſtinction, *viz.* If the Executor had taken the profits of this Land ſo long, as to furniſh him with money for this payment, or if he had other goods of his Teſtators in his hands to ſupply the payment, then is it his default, that the money is not paid, and he muſt bear the ſmart thereof, otherwiſe not; for he is not bound to make payment out of his own goods, yet he is

a

a ſullen and unkind Executor, who will not ſo do, when as he may repay and ſatisfie himſelf by the profits thereof after. Like Law, if the Executor ſuffer a Bond of a hundred pound to be forfeit, for not paying of fifty pound, having ſufficient in his hands. So alſo of a Recognizance, Statute, or Judgment, defeaſanzed upon payment of a leſs ſum; yea, I leſs doubt of all theſe Caſes, then of the forfeiture of the Leaſe for years; for haply the Executor had time to have ſold the Leaſe, and made money thereof, towards the payment of Debts; the omiſſion and neglect whereof, may be imputed unto him, as a default juſtly occaſioning recompence to be by the Law required from him. But, perhaps, he may excuſe himſelf that he could not find a Chapman, who would give him to the value thereof: Hereunto yet reaſon can eaſily reply, that it had been much better to have ſold it under the value, then to have loſt the whole value, by expoſing or abandoniog it to a total forfeiture. Yet *Quære.*

CHAP. XI.

How far, and where an Executor having Assets, is chargable, or liable to Action.

HAving considered what things shall come to *Executors*, and be Assets in their hands, for the performance of the Will, let us now consider what things the Executor is bound to pay, satisfie, or perform, and what not; where he is chargeable, and where not: this being admitted, that he hath Assets, *viz.* sufficient wherewith to perform.

Here we will consider of these parts.

1. *Of Debts, by Specialty or Record.*
2. *Of Debts or Duties, by Contract without Specialty.*
3. *Debts without either Contract or Specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

TOuching Debts by Specialty, which are the most usual and common obligo-

obligements, it will not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The moſt doubt will ariſe upon Bills, and ſuch Writings Obligatory made, and not by Scriveners nor Clarks, in common form, but by others, otherwiſe for haſte, or through ſimplicity. Thus, long ſince we find a Writing made by *A.* to *B. Memorand.* that I have received of *B.* ten pound, which I promiſe to pay, &c. This being ſealed and delivered, was held a good Obligation by *Brian* and *Catesb.* So if the words had been onely, I ſhall pay to *B.* ten pound; Whether if ſuch words, or the like, as Covenant, or Grant to pay, be in the form of a Bill or Bond, or in an Indenture or Articles, it is a ſufficient ground for an Action of Debt. And though it ſhould be miſwritten, *Wigint* for *Viginti*, or fifteen for fifteen, yet ſhall it be favourably conſtrued, and held a good Specialty of debt, as hath been reſolved in theſe and like Caſes; and ſo alſo notwithſtanding falſe Latine in the Obligation, or the plural number for the ſingular number, or words of repugnancy or non-ſenſe, yet if there be words, whereby it appears,

22 E. 4. 32.

19 R. 2. F. Det. 166.
9 H. 6, 7.
2 H. 4. 8.
23 El. M. 5.
9 H. 7. 16.
2 H. 4. 8.

28 H. 8. Dyer 22.

that *A.* is a Debtor to *B.* and it be ſealed and delivered, it is a good Writing Obligatory; yea, though it want the words of concluſion, *viz.* In witneſs whereof, as the Lord *Dyer* reports to have been reſolved; although the contrary were held in four ſeveral Kings times before, as our Books ſhew.

28 H.8. Dy. 19 & 22. 40 E.3.1. 7 H. 7. 14. 8 H.6. 36. 22 H. 6. 15. 21 E. 4. 81. 3 H. 4. 17. 11 H.4.76.

Now any ſuch Writing Obligatory doth determine or drown any duty by Contract, becauſe Specialty is of a higher nature: So as if *A.* and *B.* do bargain with *C.* to pay him a hundred pound for Corn, or other thing, and after *C.* take ſome ſuch Writing Obligatory, as aforeſaid of *A.* Now by this is *B.* diſcharged of the Debt, becauſe he ſtood charged onely by the Contract, which is extinguiſhed by the ſaid Specialty.

As for the extent and operation of theſe Specialties, to, and upon Executors, we muſt know that an Executor doth ſo repreſent the perſon of that Teſtator, and is ſo included in him, as that every Bond or Covenant by the Teſtator, made for payment of money, or the like, reacheth to the Executor, although he be not named, *viz.* that he doth not Covenant for, nor bind him and his Ex-

So reſervation of rent, grant of Annuity. 28 H. 8. Dy. 14. & 22

47 E. 3. 22. 32 H.6. 32. 10 H. 7. 18.

Executors by expreſs words (and yet the Heir not named is not bound, though there be never ſo great Aſſets, or Land deſcend unto him.)

No mention of Executor in the judgment, yet he charged.

Now touching debts upon Record, much need not to be ſaid, (except of thoſe by Stat. Merchant) for to debts and damages already recovered againſt the Teſtator, and to debts by Recognizance the *Executors* liableneſs is ſomewhat clear and conſpicuous. Yet other inferior debts upon Record, may fitly be thought of as Iſſues forfeited, fines, impoſed by Juſtices, at *Weſtm.* or at Aſſizes, Quarter-Seſſions, Commiſſions of Sewers of Bankrupts, by Stewards in Leets, or the like; for all theſe are debts of Record, which *Executors* ſtand charged withall. So alſo if the Teſtator were before Auditors found in Arrerages of Account, being a Bailiff or receiver: For theſe Auditors are by Statute, Judges of Record, but if the Account were made onely before the party to whom the Arrerage pertained, or but before one Auditor onely, it is out of the Statute, which ſpeaks of Accounts before Auditors in the Plural number. Therefore the *Executor* not chargeable, becauſe the

9 H. 6. f. 11. 11 H. 4 64. 92. Otherwiſe of a Garden in Soccage, he is out of the Stat. *W.* 2 cap. 11. *ut credo*, Co. l. 10. 103.

the teſtator might wage his Law in thoſe Caſes, not in the former.

And whereas exception was before made of a debt by Statute Merchant, it was by reaſon that the Lord *Broke* tells us, that if the Conuſor in that caſe be returned dead, no remedy appeareth for the Conuſee to have execution of the goods of the Conuſor, but onely of his Lands. If this ſhould be thus, it were a very miſchievous caſe: for many bound in Statutes, have no Lands but Leaſes, & goods of great value, and if by their death their Goods and Chattels ſhould be ſet free from this Statute, and the Creditor without remedy, the Law were defective: and it were ſo much the more ſtrange in this Caſe, becauſe the Statutes of *Acton*, *Burnell*, and *Mercatoribus*, ſeem to pitch principally upon Goods, and to tend unto aſſurance between Merchants who uſually are not Landed men. But that the Law doth give remedy in ſuch Caſe, as well againſt the Goods as Lands of the deceaſed Conuſor, appeares by the reſolution of late made, in what Order and Precedence Statutes are to be ſatisfied by Executors, as after we ſhall ſee.

36 H.8.Br. Stat. Mer.43

Of

Of Debts by Contract without Deed, as Leaſes Parol, &c.

CContracts are of divers kindes, and we will begin with thoſe in the realty, as moſt worthy. If therefore one be Leſſee for years, or for life, without any Indenture or Deed, (as he may be) and his Rent being behind, he dyeth; now is the Executor lyable to the payment of this Rent, without any Specialty, for that his Teſtator, if he had been ſued in his life-time, could not have waged his Law. But if the Leſſee for yeares in his life-time, ſell or grant away his terme or Leaſe, although he ſtill lye at the ſtake for the Rent, to grow due after, untill the Leſſor accept the Aſſignee for his Tenant; yet if the Leſſee dye, his Executor ſhall not be charged for any Rent due after the death of his Teſtator. But what if the Leſſee do not alien or aſſigne his terme, but dye thereof poſſeſſed, and the Executor perceiving the Land not to be worth the Rent, waiveth the ſame, yet the Leſſor will not enter thereinto, nor intermeddle therewith; whether may he yet charge the Executor with the Rent,

21 *H.6.1.* 44 *E.* 342.

44 *E.* 3. 5. 7 *E.* 3. 11. 14 *H.* 7. 4. *per Keble vide* 8 *E. Dy.* 247.

M. 31. *&* 33 *Eliz. in Com. ba.*

Do. & Stn. 121.

Rent, during the terme? I answer, that if he have Assets, that is, sufficient for payment of this and other debts, he cannot waive this Lease, but shall be tyed to answer this Rent, though much more than the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay mony: Yet because it is yearly Executory, the *Executor* may waive it, in case his Testators estate will not supply and bear that losse. But what if there be Assets to bear this yearly loss for some years, but not during the whole terme? I think in this Case the *Executor* must pay the Rent, so long as these Assets will hold out, and then must wave the possession, giving notice to the Reversioner; and this I think he may do well enough, notwithstanding his Occupation of the Land divers years after the Testators death, because that was not voluntary, but as of necessity; yet this I leave as a *Quære*, to be well advised of with good counsel.

Of Contracts Personall.

WHere the Testator might wage his Law, there the Action lyeth not against

againſt the Executor, as hath been touched: and therefore he is not chargeable in an Action of debt upon a ſimple Contract, as by reaſon of this or that to his Teſtator; yea, though it were the Inheritance of Land which was ſold, ſo as the ſale were without Deed; or though by Deed, yet if no counterpart were under the hand of him to whom the ſale was made. And the cuſtom of *London*, to the contrary, *viz.* that an Action of debt ſhould be maintained againſt Executors upon a Contract, was held void, at leaſt no good plea againſt other Creditors, that ſuch a debt was recovered againſt the Executor, or paid by him, as was towards the latter end of the late Q. time reſolved, though in the beginning of her time, it was a demurrer. Yea, though ſuch a debt grew for the moſt neceſſary thing, *viz.* meat and drink, which bindeth even an Infant to payment, yet will it not charge the Executor of a man of full age: but this is meant where the Contract was onely by word; for where the Teſtator putteth his Seal to any deed or writing made upon ſuch ſale, this is more than a ſimple contract, & taketh from the Vendee his wager of Law, & ſo chargeth the

41 E. 3. 23. 15 E. 4. 15. Except by a *Quo minus* in the Exchequer, to the Kings debter. *Co. l.* 9 *f.* 88. *a.* So of accounts, except for the King.

M. 22 & 33 *El. in com. bt.* By three Judges and 37 *Eli* By all, as I finde in my report, but *Co. l.* 6. *f.* 87. *b.* It is contrarily reported. 3 *El. Dy.* 196. Demurrer. 9 *E.* 4 51. 10 *H.* 7, 8. 15 E. 4. 18. 22 *H.* 6. 13. 39 *H.* 6. 18.

the Executor. But if the Teſtator ſeal but unto a tayl or tally, with ſcotches, expreſſing a debt, this is no ſuch Specialty as ſhall charge Executors. Yet in ſome Caſes without any ſeal at all, the Executor is chargeable. But although no Action of debt lyeth againſt the Executor upon ſuch a ſimple Contract, yet may the Creditor in that Caſe, maintain an Action upon the Caſe, grounded upon the aſſumption implyed, though not expreſſed, as now ſtandeth reſolved by all the Judges of all the Courts at *Weſtminſter*, though heretofore there hath been much difference of opinion thereabout: And indeed, thus the Executor is charged, in matter for a ſimple Contract, though not in manner of a Debt, but as for breach of promiſe, making recompence in damages, inſtead of the debt. And the chief reaſon for it, is, becauſe the Teſtator could not have waged his Law in this Action, upon the Caſe againſt himſelf, though in debt he might. Where the Teſtator retaineth Servants in Husbandry, or otherwiſe, and dyeth, there being wages due to theſe ſo retained, the Executor is liable to an Action of debt for the ſame, by

There though a common hoſtler, or Victualler truſt his gueſt, he loſeth his debt by his death *Co.* 90. 87. *b.* 12 *H.* 4. 23. But if the ſum be alſo written on it, they are bound as by a Deed 38 *H.* 8. *Di.* 23. *a. Slades* Caſe. *Co. lib.* 4. *Co. l.* 9. 87. *Pinchons* Caſe.

2 *H.* 4. 14.

by reason that the parties were compellable by Statute, thus to serve, and therefore the Testator could not have waged his Law; but in case of Servants not compellable, as Waiters or Servingmen, as we call them, no Action of debt lyeth against the Executor for their wages, though against the Testator himself it doth: for the Contract is sufficient to charge him who made it. See of account after.

4 *H.*6.48.

So 2 *H.* 4. *b.* 14 Servitors in the Warre by contract.

Where Executors shall be charged, without either Contract or Specialty.

WHere a Prisoner oweth money to a Jaylour, or Keeper of Prison for his Dyet, or Victuals, and dyeth, his Executors shall be chargeable for this debt, because it is for the Commonwealth to have Prisoners kept, which cannot be without affording them victuals: Also, where one hath a Patent, or Tally of the Exchequor, to receive money of some Customer, Receiver, or other Officer of the Crown, and delivereth it to him, he then having money of the Kings in his hands, if he pay not the same, but dye, his Executors shall stand char-

27 *H.* 6. 4. 15 *E.* 4. 16. *Co. lib.* 9. *f.* 87. *b. No. n. br.* 121 *a.* He must have a *liberate* also.

27 H. 6. 4. b
1 H. 7. 17.
2 H. 7, 8, 6. Clark of the Hanaper.
10 H. 6. 24, 25.

chargeable with the payment thereof. So for Arrerages of Account before Auditors, if more then one; but this is debt of Record in Law.

No. na. br. 8, 83.
Westmin. 1. c. 35.
Lib. Intr. 172. l.

So if any Lord of free Tenants, doth levy aid of them for the marriage of his eldeſt daughter, and he die before ſhe be married, ſhe may recover this money by an Action of debt againſt his *Executor*, but this is by vertue of a Statute. There is a Preſident in the Book of Entries, of an Action of debt againſt the *Executor* of an Heir, by which it ſeems that a man binding himſelf and his Heirs, and leaving Aſſets, the Heir taking the profit, becomes ſo a Debtor, that his *Executor* ſhall be charged. And in the Regiſter

Reg. orig. 141. a.

there is a Writ againſt the *Executors* of the Guardian of the Spiritualties of the Arch-Biſhop of *York*, for the debt of *B.* who died Inteſtate, and whoſe Goods came to the hand of the ſaid Guardian, *viz.* the Dean of *York*. In allowance whereof, there is a note added of the like Writ, brought in K. *R.* 2. his time, and that then a Preſident was alledged of ſuch a Writ in King *Edw.* 2. his time, againſt the *Executors* of an Ordinary, and that they were inforced

11 R. 2. 16. p. 2.

to

to answer unto it. So is the opinion of *Trew*, in the time of *Edward* the third. But *Ald.* opposeth him. Also the *Rationabile parte bonorum*, by custome in some places is maintainable for the Wife and Children, against the Executor. But no Action of account lyeth against Executors, except for the King. More hereof, *tit. Wrong.*

11 E. 4. Fit. Ex. 77. See *Co. lib. Intr.* 504. Such Actions in *York-shire.*

Of Covenants charging Executors.

VVE have already touched upon Covenants in part, *viz.* where they be expresly for payment of money, shewing them to be in Law-Bonds, that is, Writings Obligatory, whereupon an Action of Debt may be brought, as well as an Action of Covenant, though the words of the Deed bear the sound and phrase of a Covenant. Yet in some Cases no Action of Debt lyeth upon a Covenant to pay money: as if *A.* covenant, that his Executor shall within a year, or such a time, after his death, pay ten pound to *B.* now for that no Action or Debt was maintainable against *A.* himself, it lyeth not against his Executor, but onely an Action of Covenant, as was held in the late

Inter *Andrews* and *Elserig* circiter, 33 El.

Pasch. 22 El. inter *Bor.* & *Austin.* in com. ba.

Queen's time. So if the Covenant be conditional, as thus; that if *C.* do not pay to *B.* ten pound, then *A.* will pay it: and so also perhaps, if the Covenant be in the distinctive, *viz.* to do such an act, or to pay ten pound: now if the Act be not done, yet no Action of Debt lyeth for the money, but onely an Action of Covenant. But now let us come to the Cases, of meer Covenants, and see which of them will charge an Executor, and which not. If a Lessee for years covenants to repair the Buildings, or to pay the Quit-rents issuing out of the Land let, there is little doubt, but the Executor, to whom the term cometh, must as well as his Testator, perform that Covenant, although he did not covenant for him and his Executors: and yet of these Cases doubt hath been; and touching the latter, *viz.* of paying Quit-rents, divers Justices in Queen *Mary*'s time, were of opinion, that it was a thing so personal, that it dyed with the person, and did not charge the Executors: Nor is there any contrary opinion expressed in the Book. And since that time, *viz.* towards the end of Queen *Elizabeth*'s Reign, in the Action of Covenant between the Dean and Canons of *Windsor*, and

Qua. If both be to be done by the *Covenantor*; *Viz.* Ten *l.* if not five, such a day. So in *Penot*'s Case: But where the Lessor did covenant to pay the quit-rent, divers Justices thought the Executor not named, was not bound. & 2 *P.* & *M. Dyer* 114. Note the Case is *supra* in *marg. Pasch.* 38. *El.* in *Banco Regis*

and *Hide*, touching reparations; at the first, much opinion was, that onely the person Covenanting was tyed to this performance; but after it was resolved, that that Covenant did run with the estate, and so both Executor and Assignee bound to performance; but in that Case it was said by *Popham*, Chief Justice, that if the Covenant had been to do a Collateral Act, neither the Executor, nor the Assignee had been tyed thereby; and therefore where a Lessee for years covenants within such a time, to build a new house upon the Land, and dies before that time expired, I doubt whether the Executor be bound to perform this, or not; although it do concern the Land let, so as perhaps the Rent or Fine was the less, in respect of this charge of new structure or Building, which is a great reason, that the Executor, though not named, should be tyed to the performance: But if the Covenant had been to build a house elsewhere than upon the Land let, or to do any other collateral thing, not pertinent to the Land let, it is clear the Executors were not bound to perform it: and yet in those Cases, if there were a breach or non-performance in the Testator's life-time,

Co. l. 5. 24.

Resolved, P. 39 Eliz. but not adjudged till M. 43 & 44 Eliz.

as that the time of performance were expired before his death, then it is clear the Executors were bound to yield recompence by way of damages recoverable in an Action of Covenant, as both *Shelley* and *Fitzherbert* agreed; and so also did the Lord *Topham* agree in the said Case of *Hide*, as I find in my own Report of that Case, though in the Lord *Cook*, reporting onely the Point in question, that be not mentioned: Now let us consider of the Case, where there is no expres Covenant at all, so much as for the Lessor himself, but onely a Covenant implyed, or Covenant in Law, as we call it. As if Lessee for life, make a Lease for years, and die within the term, so as the Lessee is evicted by him, in reversion, or remainder. In this Case it was resolved in the late Quee n's time, by three Justices, *viz.*, *Walsh.* *Brown*, and *Dyer*, that by this Covenant in Law, the Executors were not chargeable; and in the same Case, the Lord *Dyer* sets down another Resolution after, to the same effect. But Master Serjeant *Bendlo*'s reporting this latter Case to be of a Lease made by Tenant in Tail, *viz.* before the Statute of 32 *H.* 8. or not warrantable by it, sets down the opinion

Tr. 28 *H.* 8. *Dyer* 14. There the house was to be built upon the Land leased, and yet *Baldus* seemed of a contrary opinion.

M. 8. & 9. *El. Dy.* 257. Intrat. M. 7 & 8 *Eliz.* rot. 11. 17. *Swanno Vest.* *Strangsham* & *Searles.*

nion contrarily, *viz.* That the Action was maintainable against the Executor. This may serve for instance, the like being in any other Case, where the Lessor hath not a good and a firm Title, but perhaps subject to a Condition, or other eviction, so as the Lessee cannot enjoy the Land according to his Lease. Tr. 23 El. rot. 450. inter *Broderidge & Windsor.*

But this must be so understood, that no eviction, or breach of Covenant, is in the life of the Testator himself; for if that be, there is no question but the Executor stands chargeable; and therefore if one make a Lease of Land by Deed, wherein he hath nothing; this Covenant is perhaps presently broken, and though the Lessor die before an Action of Covenant brought, it will be maintainable against his Executor, though no express Covenant. This is useful to be known, though in these days there be few Leases so made, without express Covenant, and the Executors also named. And where there is a special Covenant in express words, it doth qualifie the Covenant implyed; so as although words of demise and grant, tie the Lessor to a general Warranty of the Title against all men; yet it being after covenanted, that the Lessee shall enjoy against the *Note* and *Anders* Case.

Lessor and his Heirs, or against all, claiming under him, or his Ancestors. Now no eviction by, or under any other Title, giveth cause of Action, or bindeth the Lessor or his Executor to make recompence.

Of wrongs done by Testators, and whether Executors be liable to amends.

Although Executors do represent the persons of their Testators; yet if the Testator commit any Trespass upon the goods of another, or upon his person or Lands, no Action lyeth for this against the Executor, for *Actio personalis moritur cum persona*; So if a Sheriff, Goaler, or Keeper of Prison, suffer one in Execution for Debt or Damages to escape, though hereby the party, at whose suit the Execution was, be intituled to an Action, *viz.* an Action upon the Case against such Officer, by the Common-Law, and by Statute an Action of Debt; yet if he so suffering die, for that such difference was a wrong of the nature of a Trespass, no Action lyeth against his Executor for the same. And upon the same reason, as I presume, if one carry away his Corn and Hay, without setting out the Tenth, although

42 Ass. p. 15. 40 E. 3. Fitz. Ex 74. Co. lib. 9. f. 87. a.

though the treble value be recoverable against him in an Action of Debt; yet if he die before such recovery, the Action is gone, and lyeth not against his Executor; No, not although the Testator were a Lessee for years, so as his state came to his Executor.

Like Law in other penal Statutes, as for arresting one at the Suit of *J. S.* without his privity or assent; Or for not appearing as a Witness, being served with a *Sub Pœna*, and having charges rendered, and many like; yea, if a Lessee for years commit waste and die, no Action lyeth against the Executor for this waste; for all these Cases are within the rule of *Actio personalis moritur cum persona*, and many other like Cases might be put, but these may suffice. Yet if a Parson, Vicar, or other Spiritual or Ecclesiastical person, do suffer a ruine or decay of the houses or Buildings upon his such Spiritual Benefice or promotion and dyeth, his Executors are lyable, by the Spiritual or Ecclesiastical Law, to the Successor's Suit for amends, to the repairing of such spoil or decay. And because some used fraudulently, to grant away their goods, so as nothing shall be left to their Executors,

it was enacted *temp. Elizabethi*, that such
13 El. c. 16. Grantees of Goods should be liable to the Successor's suit, for these *delapidations*, as if they were Executors.

As for one other Case of this nature, *viz.* where an Executor wasteth the goods of his Testator, or an Administrator of the goods of his Intestate, and dyeth; Whether his Executor be subject to Action for this, or not: I adjorn the Reader to that place, where I shall treat of such wasting, or devastation, by Executors.

Unto this head, not unfitly, may be referred, what before is said of Actions against the Executors of the Debtor's
Fitz. Ex. 77. heir, and the Executors of the Ordinary, for the Specialty binding to payment, reacheth not to any of these; but because their Testators should have paid these Debts, with the Goods or Profits of the Lands of the Debtor, and did not, but retained them to themselves: therefore, for this, as a wrong, are they suable, as I take it. So also by the same reason are the Executors of an Administrator chargable, where he did neither pay the Debts, nor leave the goods to the next Administrator, but otherwise disposed of them. Yet an Executor is not chargeable in an Action

I conceive no difference between this and the other Cases, *supra*.

ction of *Detinue*, nor of account (except to the King) for the Teſtators detaining, not paying or anſwering things received, or under his charge.

2 H. 4. 13. he may by admit. Co. l. 11. f. 88. 3 H. 6. 35. Con. for Arrerages of an account before auditors.

And the reaſon why, after account made before Auditors, and the Bailiffe, or receiver be found in Arrerages and die, that in this Caſe his Executor is chargeable, is, becauſe the Auditors are made Judges by the Statute, *Weſtm. 2. cap.* 11. ſo this Arrerage which they have judged, is a debt by Record.

11 H. 5. 64. 91, 92. 9 H. 6. 11. 13 Ed. 1.

But if the Caſe be put on the other ſide, *viz.* that the Bailiff, or Receiver, have found in ſurpluſage upon his Account, *viz.* that he hath laid out more in his Lords or Maſters buſineſs, then his receipts amounted unto, and then his Lord or Maſter dieth, now ſhall not he have any Action againſt the Executors, for the ſurpluſage, becauſe it is out of the purview of the ſaid Statute.

Co. lib. 9. f. 87. 2.

CHAP.

CHAP. XII.

Of the Order and method to be used by Executors in payment of debts and Legacies, so as to escape a devastation or charging of their own goods.

WE have gone through and dispatched the two first proposed parts, *viz.* 1. Touching the being of Executors, and the manner of their being. 2. Their having, and the manner of their having. We come now to the third part, *viz.* their doing or disposing of the Testators estate.

Now this consists principally in the issuing of money, though partly also in delivering or assenting to the execution of Legacies, not being money but other goods or Chattels bequeathed.

Money is to be issued by Executors, four wayes ordinarily.

About the funeral of the Testator.

About proving his Will.

In paying of debts.

In paying and satisfying of Legacies peculiarly.

As

As for the first, Burials be as of necessity, for two respects, *viz.* 1. Of charity to the dead, that he may be Christianly and seemingly interred. 2. To prevent and avoid annoyance to the living, who by the very view of the dead Carkases, would both be affrighted, and within a few dayes distasted at the nose. We know that under the Law, the touching of a dead Carkase made a man unclean, and to need purifying: nor can we easily forget what the Sisters of *Lazarus* said to our Saviour touching their Brother, when he had been dead three or four dayes: *viz.* that the taking of him then out of his grave must needs bring a noysome savour. Hereabout therefore, some expence is necessary, and that not onely for fees to be paid, which in *London* amounts to a considerable sum, specially for such as are to be buried within the Church, but also otherwise, *viz.* for the Pall or Herse-cloath, the ringing, *&c.* As for feasting, and banqueting, it seems not to be congruent to the sadness and dolefulness of the action in hand. But howsoever that be, yet where the Testator leaves not sufficient goods to pay his debts, festival expence is to be forborn,

except the Executor will out of kindneſs bear it with his own purſe; for dead debtors muſt not feaſt to make their living creditors faſt. I mentioned a conſiderable amount of funeral fees payable in *London*, and ſurely (to let my thoughts fall back upon it a little) it is worth conſideration, whether in that kinde, and eſpecially for thoſe who dying there, are yet carried into their Countries to be buried, the exaction be not either unjuſt altogether, or too oneroufly exceſſive: ſo alſo for much ringing, contrary to the Canon made at the Convocation in the firſt year of King *James*.

The next thing mentioned to juſtifie and occaſion expence, is the proving of the Will: But this way a greater diſburſement (except for riding charges, or by reaſon of oppoſition by a *Caveat* put in or the like) will not ſtand allowable, then is preſcribed by the Statute made in the time of *Hen.* 8. whereby the fees of Ordinaries, and their Scribes, Regiſters, and Officers be limited. And it is ſtrange, that theſe bounds have been ſo much, and ſo frequently broken and tranſgreſſed; the rather, for that long before in the time of K. *Edw.* 3. by an Act of Parliament, this pro-

21 *Hen.* 8. cap. 5.

13 *Ed.* 3. c. 4.

provided that the King's Justices should as well at the King's suit, as at the Parties grieved, enquire after such oppressions, or extortions, for so they be called; yea, St. *Germ.* who was no stranger to the Civil and Canon-Law, as appears by his Book, saith, That the Ordinary ought to take nothing for the Probate, if the goods suffice not for Funeral and Debts; but he means onely, that Conscience is against it. *Do. & Stu. l. 2. cap. 10.*

Now we come to the third occasion of Disbursment, *viz.* payment of Debts, which is the main part of our business. We have before seen what Debts lye upon Executors, having Assets to pay them; we are now to see in what order they must pay them, as well *Ut sine fidi dispensatores*, as for their own indempnity, *ne quid res sua capiat detrimenti.* To put our selves into the better order or method of handling these things, we will sort out Debts into their several kinds, thus.

They are of these three sorts, *viz.* either,

Debts of, or upon Record.

Or Debts by Specialty.

Or Debts without Specialty.

The Debts upon Record, may be again divided into four sorts, or kinds, *viz.*

Debts to the King or the Crown.

Debts

Debts by judgment or recovery in some Court of Record.

Debts by Recognizance.

Debts by Statute-Staple, or Statute-Merchant.

Amongst these, the debts of the Crown are to have the first place of precedence, so as if there be not come to the Executor goods of greater value then will suffice for the satisfaction of these, he is not to pay any debt to a subject; and if he be sued for any such, he may plead in Barre of this suit that his Testator died thus much indebted to the King, shewing how, *&c.* and that he hath not goods surmounting the value of that debt. Or, if the subjects pursuit be not so by way of action, as that the Executor hath day in Court to plead, but be by way of suing execution, as upon Statute-Merchant, or Staple, then is the Executor put to his *audita querela*, wherein he must set forth this matter. And there is great reason, why the Kings debts should thus be preferred before any subjects, *viz.* for that the Treasure Royal is not onely for sustentation and maintaining of the Kings Houshold, but also for publick services, as the Warres, *&c.* as appeares by the Statute,

M. 33. & 34 *Eliz.* the Lady *Walsingams* Case in com. ban. & *Tr.* 39 *Eliz.*

ture, 10 *Rich.* 2. *cap.* 1. And therefore it is, as I conceive, that *Bracton* saith of the Treasures or Revenues Royal, *Roborant coronam*; they do strengthen or uphold the Crown. And for the like Reason, as I think, did God inact touching the possessions of the Crown, that if they were given to any other then the Kings own Children, they should revert and come back to the Crown the next Jubilee, which was once in fifty years, *sed de hoc satis*. But this priority of payment of the Kings debt before the debt of any subject, is to be understood only of debts by or upon Record due to the King, and not of other debts. If any ask how the King should have any debts which shall not be of Record, since by the Statute 33 of King *Hen.* 8. cap. 30. it is inacted that all obligations and specialties taken to the use of the King, shall be of the same nature as a Statute-Staple: To this I answer, that there may be sums of money due to the King upon wood-sales, or sales of Tinne, or other his Minerals, for which no specialty is given; so also of amercements in his Courts Baron, or Courts of his Honours, which be not Courts of Record: The like of

Lib. 1.

21 E. 4. 21. 22. So must it be pleaded M. 33. & 34 *Eliz.*

fines

fines for Copy-hold ſtates there. So of the money, for which Strays within the King's Manors, or Liberties, are ſold. Alſo, as the Law hath lately been taken and ruled in the *Exchequer*, even Debts by Contract due to any Subject, are by his Out-lawry, or Attainder, forfeitable to the Crown. Yet neither theſe, nor thoſe due to ſuch perſon out-lawed, or attainted by Bond, Bill, or for Arrerage of Rent upon Leaſe, is, or can be any Debt of Record, until Office thereupon found; for although the Outlawry, or Attainder, be upon Record, yet doth it not appear by any Record before Office found, that any ſuch Debt was due to the perſon out-lawed or attainted. Thus are not theſe Debts to the Crown, to have priority of payment before the Subjects Debts, though the King's debts of Record are ſo to have, ſo that if a Subject, to whom the Teſtator was indebted by Specialty, ſue for this Debt, the Executor muſt plead, that the Teſtator dyed indebted thus much to the King by Record, more then which he left not goods to ſatisfie; if the truth of the Caſe be ſo, for if there be ſufficient to ſatisfie both, then the Subject Creditor is not to ſtay for his Debt, till the King's debt

And muſt plead the Record in certain, as was held in the Caſe of the Lady *Walſingham*, 31. & 34 *Eliz.* But it ſufficeth to ſay, by a Record of the *Exchequer*, as was held *Tr.* 39 *Eliz.* in ban. reg.

debt be levied. And if the ſubject creditor ſue execution upon a Statute, ſo that the Exec. hath no day in Court to plead this debt to the King, then is the Exec. put to an *audita Querela*, wherein he muſt ſet forth that matter, and ſo provide for his own indempnity. But what ſhall we ſay of Arrerages of Rent due to the King? Surely, where it is a Fee-farm Rent, or other rent of Inheritance, I ſee not how it can come under the title of debt, ſince for it no action of debt is maintainable ſo long as the ſtate continueth in him to whom it grew due; & I find that the L. *Dyer*, *M.* 14 *Eliz.* ſaid, that the King could but onely diſtrain for his Rents, and not otherwiſe levy them of lands or goods; and that the King by his Prerogative, may diſtrain in any other lands of his Tenant, our books tell us, but no more: yet I know it hath been otherwiſe done of late in the Exchequer, which if it have been the ancient and frequent uſe of the Exchequ. it will ſtand as Law, though unknown to the L. *Dyer*. Now rent upon a leaſe for years, differeth from the other, ſince for the arrer. there of an action of debt lieth, but how can either of theſe be debts of Rec. when the not payment may

be either in the Court of Exchequer, or to the receiver general or particular? and how then can there be any certain Record of the not payment, so as to make any certain debt upon Record? We know Statutes have been made to make the Lands of receivers subject to sale, for satisfaction to the Crown; and besides that, some antient Patents direct the payment of Fee-farms into the hands of Sheriffs. The Stat. of *Westm.* 1. cap. 19. provides remedy for the King against Sheriffs not answering the debts of the Crown by them received: so as the Kings Farmer or debtor may have payd his Rent, or other debt, and the Crown have not yet received it. Of Fines and amerciaments in the Kings Courts of Record, there is no doubt but they are debts of Record.

Come we now to the debts of subjects, and first those of Record; touching which, I shall not be able to hold so good a method, and so well to handle things by parts as I would, for that the parts so stand in competition one with another for precedency, as that they must of necessity thereabout conflict and interplead one with the other, and contest one against the other: yet for the Readers better ease and

ability

ability to find out that which may concern him in his particular caſe, I will in the beſt ſort I can, ſingle out theſe things into ſeveral parts, and place them in ſeveral rooms or ſtations. Firſt, conſidering how it ſhall ſtand between one judgment and another, had either againſt the Executor or Teſtator. Secondly, how between Judgments, and Statutes or Recognizances. Thirdly, how betweene Recognizances and Statutes. Four thly, how between one Recognizance and another. Fifthly, How between one Statute and another, adding to each ſome obſervations incident.

Now next to the debts of the Crown, are judgments or debts recovered againſt the Teſtator, to have priority, or precedency in payment, as being of an higher nature, or more dignity than any other: for that, Statutes and Recognizances, though they make debts upon Record, yet are they begotten but by voluntary conſent of parties; whereas in every Judgement there hath been a courſe and work of Juſtice againſt the will of the Defend. as is preſumed; and this in a Court of Juſtice; and the Records of ſuch Judgments are entred in publick Rolls, not kept or

carried in Pockets or Boxes as Statutes, as untill inrollment Recognizances are. Therefore Executors muſt take heed that Judgments againſt their Teſtators (before debts any other way) if they have not ſufficient for both, be firſt ſatisfied; leſt they draw the burden of this debt upon their own backs. Now their way to help themſelves, being ſued or purſued for other debts, is the ſame before delivered touching debts upon record to the Crown, *viz.* by plea, where they may plead; as in *Scire facias*, upon a Recognizance, or ſuit upon Band, and by *Audita querela*, where they cannot plead, as when execution is ſued upon a Statute. And if they had no warning in the *Scire facias*, but upon *Nihil* returned the Judgment paſſed, there alſo the Exec. may be relieved by *audita querela*, becauſe there was no default in him, that he did not plead, or ſet forth the Judgment upon the ſuit in the *Scire facias*. Nor will it be any plea for the Creditor by Stat. to ſay, that his Stat. was acknowledged before the Judgment, and ſo is more ancient; for a latter or more puiſne Judgment is to be preferred before a Statute in time precedent. But if this Judgment be ſatisfied, and it onely kept on

Coll. 5. f. 28. So *Wray* and *Gaudy*, inter *Bond* and *Bales*, 28 *El.* vel circiter.

Yea though a Writ of Error by the Exec. to reverſe the Judgment, yet ſuffering a Stat. to be executed, muſt pay of his own. *Read* and *Beachlocks* Caſe. p. 43. *Eliz.* Barn. ſo held in *Reads* Caſe ſup. a. *vide* 12 *H.* 7. *Kel.* 24, 25. to like purpoſe.

Co. lib. 4. f. 59. So *Periam* in Com. Ba. inter. *Charnock* & *Winſley* 34 *Eliz.* vel circiter.

on foot to wrong other Creditors, or if there be any defeaſance of the Judgment yet in force, then the Judgment will not avail to keep off other Creditors from their debts: And thus much touching debts by Judgment, *viz.* how they ſtand in priority before other debts, by Statute or Recognizance. Now to ſee how they ſtand among themſelves, let this be obſerved, *viz.* that between one Judgment and another, had againſt the Teſtator, precedency or priority of time is not material; but he which firſt ſueth Execution, muſt be preferred, and before any Execution ſued, it is at the election of the Exec. to pay whom he will firſt; yea, if each bring a *Scire facias* upon his Judgement, the Exec. may yet confeſs the Action of which he will firſt, notwithſtanding the *Scire facias* was brought by the one before the other. In this *Scire facias*, the Defendant may plead generally, that he hath fully adminiſtred before the *Scire facias* brought, without ſhewing, that he did adminiſter in payment of debts of as high nature; yet that muſt be proved upon the Evidence, elſe the tryal will fall out againſt the Exec. Thus have I delivered the moſt material things in my apprehenſion,

Co. l. 5. f. 28. *Co.* l. 8. f. 132. So held in 15, & 16 *El.* So in the *Scire Facias*, by *Bond*, againſt *Bales*, it was held.

henſion touching debts by Judgment; yet thereabout I will add for the better information of the Reader, not ſtudied in the Law, theſe few things. Firſt, that what hath been ſaid, is onely to be underſtood of Judgments againſt the Teſtator, and not of any againſt the Executor himſelf, for of thoſe, being but debts by ſpecialty at the time of the Teſtators death, we ſhall ſpeak after. Secondly, what is ſaid of the Teſtator, in caſe of an Executor immediate, is likewiſe to be underſtood of the Teſtators Teſtator, in caſe of the Executor of an Executor; for where *A* makes *B* Exec. and *B* makes *C* Exec. there the goods which came from, or were left by *A*, be not in the hands of *C*, liable to Judgments had againſt *B*. Nor on the other ſide, are the goods of *B* in the hands of *C*, ſubject to the Judgments had againſt *A*. And the like is to be underſtood of Statutes, Recognizances & Bonds, as elſewhere is ſomewhat touched. Thirdly, Recoveries or Judgments by meer confeſſion without defence, are yet of the ſame nature, and to have the ſame reſpect as other recoveries upon trial or otherwiſe; for although they may ſeem to be but of the nature of Recognizances, which be *debita recog-*

9 El. 4. 14, 15 *Quare*, of arrearages of account before auditors without ſuit; for the Executors are charged by Judgment of the Auditors, by Stat. W. 2 Judgment of Record.

10 H. 6. 24. 25. Bre. det. 183.

recognita, yet do they differ from them, in that here a debt is demanded by a Declaration which is intended true, and that therefore the Defendant cannot deny it: but in case of a Recognizance it is not so; for there usually no action is entred, nor debt demanded. Fourthly, the foreshewed respect to debts by Judgment, is not to be inclosed within *Westminster* Hall, and be restrained to the four Courts there, but may, and must extend it self to Judgements in other Courts of Record, *viz.* in Cities and Towns Corporate, having power by Charter, or prescription to hold plea of debt above forty shillings, as in *London*, *Oxford*, *&c.* For although there Execution cannot be had of any other goods, than such as be within the jurisdiction of that Court, yet if the Record be removed into the *Chancery* by *Certiorari*, and thence by *Mittimus* into one of the Benches, so Execution may be had upon any goods in any County of *England*. Fifthly, in Case where the Testator was bound in a Recognizance, and a *Scire facias* brought against him, and thereupon Judgment given; although this Judgment be not *quod recuperet*; as in case of Actions of debt; but *quod habeat executionem*,

Quare, of Judgment in a Writ of Annuity for Arrerages after.

nem, yet since Execution is the life, fruit, and effect of all judgments, this may now well stand for a debt by judgment, as I take it.

Of Recognizances and Statutes.

NExt unto debts by Judgment, are those by Stat. or Recognizance to be regarded by the *Executor*. And because I find no difference of priority or precedency between these two, I therefore rank them together; yet one reason of preferment given to judgments before Statutes in *Harrisons* case, *viz.* that the one remains a Record upon a Roll in the Kings Court, whereas the other being carried in the pocket of the Conusee, is more private: this I say, should give priority also to Recognizances before Statutes: As also another reason, for that Statutes are not properly Records, but Obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the Stat. is the more expedite remedy, since thereupon Execution may be taken out without a *Scire facias*, or other suit, which cannot be in the case of a recognizance: for there, if a year be past after the acknowledgment, no Execution can be sued out against the party

party himſelf acknowledging it, without a *Sci. fac.* firſt ſued out againſt him: And if he be dead, then though the year be not paſt; yet muſt *Scire facias* be ſued, and thereupon the Executor defendant may plead ſome plea o hold off the Execution for a time. But, this notwithſtanding, the Executor may ſatisfie the recognizance before the ſtatute, at leaſt if he do it before execution ſued thereupon; for they ſtanding in equal degree, it is at his election to give precedencie and preferment to whether he will. Neither is it material which of them were firſt or more antient; nor between one ſtatute and another doth the time or antiquity give any advantage as touchinig the goods, though as touching the Lands of the conuſor it doth; but as for his goods in the hands of his Executor, whoſoever firſt getteth hold of them by his Execution, ſhall have the preferment. And before ſuing of execution, the Executor may give precedence or perferment to whom he will. But now ſome may object, that there is no courſe nor writ of Execution for any ſuch conuſee againſt the Executor; and if ſo, then ſtatutes merchant, and of the ſtaple, are in vain ſpoken of, and it is true that Maſter

Before *Sci. fas.* not after voluntarily, but if levied by writ of Extend, is good.]

Brooke

Bro. No. c. 204 & Stat. Mar. 43.

Brooke, after Chief Justice of the Common Pleas, in his new case, professeth, that he knew not any remedy for the creditor out of the goods of the conusor after his death. But if this should be so, the Law were very defective, since the substance of many, especially of Merchants, for and among whom the statute-Merchant was provided, consisteth usually more in goods then lands; besides the plea of *Harrison*, administrator of the goods of *Sidney*, in Bar of *Greenes* action of debt upon an obligation, *viz.* that the intestate stood bound in a statute-staple to *I. S.* and *Greenes* reply thereunto, that there were Indentures of defesance, no covenant whereof was broken; and the resolution of the Judges that the said matter in the replication was good to avoid the defendants plea; All this, I say (and the resolution of the Judges of the Common Pleas in that case and in the case between *Pemberton* and *Barram*, as also in the Kings Bench by *Popham* and the rest of the Judges, that Executors must satisfie judgments before statutes, and statutes before obligations) had been idle, and savouring of grosse ignorance, if no execution at all

Co. l. 5. f. 28. b. Hob. 9. El. rot. 119.

P. 32. El. rot. 235. in Co. b.

all could be had againſt the Executor of him bound in a ſtatute; and then ſhould *Greenes* have demurred upon the plea of *Harriſon*, and needed not to have pleaded that other matter; but none of the Judges or Serjeants ever conceited any ſuch matter: that which there was replyed, *viz.* that the ſtatute was not forfeited, is here to be remembred, as good matter both againſt ſtatutes and recognizances, and that whether the recognizance have a defeaſance or a condition not broken, ſo that the recognizance is not forfeited. In none of theſe caſes is the Executor hindered from payment of debts by ſpecialty, nor can he be juſtified or excuſed if by colour thereof he refuſe ſo to doe; and indeed elſe might creditors be exceedingly defrauded by recognizances for the peace and of good behaviour, *&c.* and ſo by ſtatutes for preforming covenants touching the enjoying of Lands, if theſe ſhould keep off the payment of debts, and yet themſelves perhaps never be forfeited, nor the ſummes become payable.

See Co lib. 5. 91 execution againſt an Exec. upon a ſtatute. Semaines caſe.

Co. lib. 5. 28. So it ſatisfied. though not diſcharged.

Of

Of debts by ſpecialty.

NOw come we to debts due by ſpecialtie, *viz.* Bond or Bill (of which nature the greateſt number of debts are:) Let us then ſee what coaurſe the Executor muſt or may hold for ſatisfaction of theſe, admitting that the Teſtator ſtood not indebted by any record, or that no forfeiture is of any ſuch debt, or that there be goods in the Excutors hands above the Amount of ſuch debts by Record. This I ſay, *dato*, then according to the rule, *Proximus quiſque ſibi*, the Executor may firſt ſatisfie himſelf of ſuch debts, as the Teſtator by ſpecialty owed him: for ſuch debts are not releaſed by the creditors taking upon him to be Executor to the debtor; though on the other ſide if the creditor make his debtor Executor, this is a releaſe of the debt. Although it be given out or commonly ſpoken in the general, that an Executor may firſt pay himſelf, yet is it to be underſtood with this caution or condition, *viz.* That the debt to him be of equal height or dignity with the debts to others, according to the rule, *In æquali jure, melior eſt conditio poſſidentis*,

poſſidentis: for if his teſtator were indebted to other menby any ſtature, judgment, or recognizance, & to him whom he maketh Executor only by bond, or other ſpecialty, then may he not firſt pay himſelf, that is, by paying of himſelf leave them unpaid whoſe debts are of an higher nature; but if there be ſufficient for ſatisfaction both to them and himſelfe, then is it not materiall which he firſt paid. Now touching the debts to other men, the Executor hath power to give preferment in payment to whom he will; ſo that if the Teſtator left but 100. *li.* being indebted to *A.* 100. *li.* and to *B.* 100. *li.* by ſeveral obligations, the Executor hath power to pay *B.* his whole debt, and to leave *A.* altogether unpaid any part of his debt, ſo as he have not commenced any ſuit before payment to *B.* But yet herein this difference is to be taken and obſerved by Executors, that if the time of payment upon the bond of *B.* were not come at the time of the Teſtators death, then may not the Executors before the money to *B.* become payable, pay him & leave *A.* unpaid whoſe money was preſently due. Yet if *A* forbeat to demand or ſue for his debt till the debt of *B.* become alſo pay able, then

28 H. 8. *Dy.* 22. Doct. & St. ca. 19. p. 78.

is

is it at the will of the Exeeutor to Pay whether of them he will; ſo as the other may loſe his whole debt, if the goods will not ſuffice to pay both. What if *A* have only by word demanded his debt, and not by ſuit, before the debt to *B.* become payable, Whether doth that hinder that the Executor may not now, when the money to *B.* is alſo payable, pay him and leave *A.* unpaid? And hereunto S. *Germ.* anſwereth negatively, making this verbal demand to be idle and of no value: yet, he addeth that if *A.* have commenced ſuit before the debt to *B.* become payable, yet if the Executor can delay the ſuit till the debt of *B.* become payable, ſo that *A.* can get no judgment befor that time, and before *B.* hath commenced ſuit upon his Bond, then may the executor confeſſe his Action, and ſo pay his debt, leaving *A.* unpaid. But of this I make ſome doubt, for that I find in 9. of King *Edw.* 4. ſome admittance, that if *A.* having a Tally, Patent, or other Warrant from the King for receipt of money, of or from a cuſtomer or receiver where other had like Warrants before him, but *A.* maketh the firſt demand; now muſt the Offirer firſt pay him,

Do. & St. 2 p. 78 Quære, If then he may not plead this judgement *poſt ult.* contin. againſt *A.* as he may plead it againſt other ſuits after commenced. Col: intr. 148. 269. 149. a.

him, or elſe himſelf ſhall become debtor to him, if he firſt pay others, whoſe demands were after made, though they had Warrants before *A.* Likewiſe there is, as to me ſeems, ſome Admittance, in the ſame booke, that the very Demand made by a Creditor of his debt from an Executor, who hath then aſſets in his hands, doth intitle the creditor to recover damages againſt the Executor out of his owne goods; which if it ſo be, then doth even the verbal demand lay ſome tye or obligation upon the Executor for payment. But hereabout I lay downe nothing peremptorily. We partly may diſcerne by the premiſes how the Executor is to guide himſelfe, in the caſe where there be divers debts by ſpecialty, all due, and payable at the Teſtators death, before any ſuit commenced for any of them: for in that caſe clearly the firſt verbal demand gives not any precedence, all being due, and ſo ſtanding in equal degree; And this is implyed in many books, making the commencement of the ſuit only that which intitles to priority of payment, or at leaſt reſtraines the election of the Executor. Yet, admit that one creditor firſt doth begin ſuit, if

41 E. 3. Fitz. Ex. 68 & 7. El. Dy. 232. vide 21. *A.* 7 Celw. 74.

others

5 Hen 7 27. So Wainsley inst. p. 39 Eli. in Error. a. Serjants Inne. Co. li. Intr. 2 6. such a recovery by confession is pleaded against another, and admitted good &c. 148, 149. Do. & St. p. 78. b.

others also after sue before he be paid; or have judgment; now cannot the Executor pay him first, who first commenced suit, but he who first hath judgment must first be satisfied. And the Executor may herein yield help to one before the other. *viz.* by essoignes, emparlances or dilatory pleas to the one, and by quick confession to the others action; for he is not bound against his will to stand out in suit, and expend costs where the debt is clear, nor is this covin but lawfull discretion, which conscience will also approve, some good consideration inducing. Nay, after suit commenced, yet untill the Executor have notice thereof, he may pay any other creditor, and then plead that he hath fully administred before notice;. Nor is the Sheriffes returne of summons or distresse sufficient cause of notice; for the summons might perhaps be upon his Land: but if it were to his person, it is notice sufficient, and then to save himself, he must say that he was not summoned till such a day, before which he had fully adminirsted; yet doubtlesse the Executor may be arrested at the creditors suit in some sort, which yet shall be no sufficient notice of this debt.

debt. As for the purpose, if he be sued by *Latitat* out of the Kings Bench, this supposing a Trespass, gives no notice of a debt, so also of a *Sub pœna* out of the Exchequer; but the original returnable in the Common-pleas expresseth the debt, and so in some sort do the process thereupon. And there it seems by some books, that if it be laid in the same County, where the Executor dwells, he must take notice of it at his own peril. But this I take not to be Law, nor is there any great opinion that way; and although to make it more clear, the Executor in King *Hen.* the fourth his time, estranging himself from notice of the suit before payment to others, did alledg, that the action was laid in a forreign County; that is no great proof, that if his abode had been in the County, where the Action was brought, he must have taken notice; but thus it was clearer, and a little surplusage hurts not.

So also was it said *Tr.* 29 *Eliz.*

Now between a debt by obligation, & a debt for rent or damages upon a Covenant broken, I conceive no difference, nor any priority or precedency, but it is at the executors discretion to pay first which he will, as if all were by bond. So also

of rents behind & unpaid, as I conceive; but touching them, principally intending Rent upon Leases for years, divers considerations are to be had, and some distinctions to be made: as first, between Rent behind at the time of the Testators death, of which that before said is to be understood: and that which groweth behind after, next between suit for the rent by action of debt, and by distress and avowry. As to the first difference, if the rent grew due since the Testators death, then is it not accounted in Law the Testators debt, for only so much is in Law accounted Assets to the Executor, as the profits of the Lease amounted to, over & above the Rent, so as for that Rent so behind the Executor himself stands debtor, as hath been resolved, and therefore he is suable in the *Debet* & *Detinet*; whereas for rent behind in the Testators life, & all other the debts of the Testator he must be sued in the *Detinet* onely. Hence it must follow, as it seems, that an Executor sued for debt upon bond or bill, cannot (except in some special Cases) plead a payment or recovery of Rent grown due since his testators death; though of rent behind at the time of his death it be otherwise. And

yet

yet here again another difference or diſtinction is to be taken, *viz.* where the profits of the Leaſe exceed the Rent, and where the Rent is greater than the yearly value of the profits; for even there, as elſewhere is ſhewed, the executor, if he have aſſets, is tied to the holding of the Leaſe, and payment of the Rent, & conſequently, doth ſo much of that Rent as exceeds the yearly profit, ſtand in equal degree the teſtators debt, with other debts by ſpecialty; and yet again to re-conſider this point, what if the debts of the teſtator by ſpecialty payable preſently at his death, or before the time that any rent can grow due upon this Leaſe, ſhall amount to the full value of the teſtators goods; may not then the executor, though he do not pay thoſe debts before the rent-day (for that would make the Caſe clear) waive the terme; for if he may, then haply if he do not ſo, but ſhall by payment of any of this Rent want Goods to pay any part of the debts by ſpecialty, it may lie upon himſelf, and his own goods, as hapning by his own default. But on the other ſide, it may be ſaid, that he could not waive it ſo long as he had aſſets, becauſe thereby he ſtood equally liable to pay that debt, being

ing once due, as the other debts by ſpecialty. On the other ſide it may be ſaid, that though the debts for Rent, and upon bond, ſhall be admitted to be in nature equal; yet the Caſe being put of Rent not due at the time of the Teſtators death, it was not then a debt nor duty, whereas a Bond makes a preſent debt and duty, though not preſently payable, the day of payment being not yet come, ſo as this later is diſcharged by a releaſe of debts, or duties, and ſo is not the former. So to leave that point unreſolved, let us next ſee whether in ſome caſe, though the rent exceed not the yearly value of the Land, yet even that payable after the death of the Teſtator may not ſtand in moſt part, if not wholly upon the Teſtators ſcore as his debt, as well as if it had been payable before his death. *Poſito* then, that the whole or half years Rent is payable at the Annunciation of our *Lady*, and that the Teſtator dieth two or three dayes, or ſome like ſhort time before that feaſt; now certainly, ſhould the Law be unreaſonable, if it ſhould lay this debt upon the executors ſhoulders, in reſpect of thoſe few Winter-dayes profits which he took. But ſurely, ſince the taking of the profits, induceth the

the Law, to lay the rent upon the Executor as his own debt; therefore as where the Executor had the profits for the whole year or half year, except some few dayes incurred in the testators life-time, those few dayes will be unregarded according to the rule, *De minimis non curat lex*, and the whole Rent shall lie upon the Executor as his own debt. So on the contrary part, where the whole year, or half years profit, except some few dayes incurred after the Testators death, the Rent becoming payable so instantly after the Testators death, must in reason, lie wholly upon the Testators Estate, as to me it seems. What if to this I add, that the Testators Cattel, wherewith the ground was stocked, do depasture, and devour the profits, all the time after the Testators death, till the day of payment of the Rents? Nay, if the Rent were payable at *Mich.* and the Annunc. and the Testator dies a few dayes after *Mich.* the Rent being of, or near the value of the Land, it will then be hard, that the Exec. shall for this winter profit, pay the Rent out of his own purse, especially, if the whole years Rent be payable at that one day, as in some Cases it is; or if the whole years profits were taken in

the Summer, as in case of a lease of tithes, it is so also of meadow grounds usually drowned in the Winter. So if the Lease be then to end, not having a Summer half year to succeed, and make amends for the Winter: or if the Winter half year be the latter half, the Lease beginning at *Lady* day, so that there is but a Summer for each Winter following, and not any for the Winter passed. Of like consideration with these, is the case of a Lease of Wood for a Rent, which being fellable but once in eight or nine years; now if the Lessee having made the last sale and felling before his death, the Law should cast the Rent upon the Executors own Estate for the time future, it should lay losse upon him, which is against Reason, and contrary to the nature and disposition in the Law, even in this particular. As appeares by this, that she enables an Executor to pay himself before any debt of equal nature, so as she more tenders an Executors indempnity, than any other Creditors; therefore I think that with, & upon the differences above shewed, even rent grown due after the Testators death, may in some Cases be the Testators debt payable equally with debts by

bond.

bond. But here I conceive, that if the executor were in such case of destitution of assets, as might justifie his waiving of a Lease over-rented, he then may waive the termes residue; because for the future, the profits will come short of answering the Rent, though at the first, and so in the total, the profits did exceed the Rent. And if for want of waiving where he might, this Rent fall upon him, the payment thereof would be no excuse against another Creditor, nor as to him be a good administration; for, *Ignorantia juris non excusat.* This is pertinent to our present consideration, which debt may with safety be payd, leaving another unpayd; and the hazard of executors by ignorance of the Law hath been a principal motive to my writing these discourses in *English.* Hitherto we have onely considered, as I think, of Rents, as they be recoverable by action of debt. Now let us see, if there may not be somewhat different considerations touching distraining for Rent, and so coming to recover it by avowry. Put we then the case, that an executor hath fully administred in payment of debts by bond, and after the lessor or reversioner cometh and distraineth for arrerages of

rent due in the Teſtators life; can the Executor in barre of the avowry plead fully adminiſtred, as he might have done, if an action of debt had been brought for theſe Arrerage? doubtleſs, I think no; nothing ſhall hinder the levying of the Rent upon the Land, ſo long as it is enjoyed under the title of the Leaſe, except the Land come to the King, upon whoſe poſſeſſion no diſtreſs can be taken: I think therefore, that the Executor, who payd out of his own purſe, to the value of this Leaſe, (for ſo I intend the Caſe, and elſe could he not have fully adminiſtred, as in the Caſe was put) he ſhould, I ſay, have abated in the price and valuation of the Leaſe, as well the arrerages of Rent, as the rent futurely payable, both being equally leviable upon the land; and if he ſo have done, he is no loſer by payment of this arrerage: but if truſting to the power of an Exec. & to the plea of fully adminiſtred, he did not ſo, but diſburſed, in reſpect of the Leaſe to the full value, without ſuch abatement, he muſt bear the loſſe of his own ignorance. He might alſo another way, have helped himſelf, *viz.* by payment of that arrerage, leaving other debts by ſpecialty unpaid, And what if ſuits were preſently

presently commenced upon the testators death, before he could make payment of the rent behind, Whether might the executor then plead this debt for rent, as he might a debt by judgement or statute? and surely me thinks it's probable that he might, because it is a debt from which he cannot be freed by payment of the other debts sued for by specialty. If the reversioner would also commence suit before judgment had for the creditor by specialty, then might the Executor helpe himselfe by confessing his action first; but this perhaps the reversioner would not conceive safe for him, since that way the others might get judgement before him, and so he might lose both his suite and his debt; whereas holding himselfe to the course of distress, the lease continuing, he hath land at the stake for his debt. What if he distrain and avow? may not now the executor pay him, or at least confesse his action or avowry, so as he first having judgement, may first be satisfied? Surely after suit commenced, I see not how the creditors by bond can so be prevented, at least without judgment had for the rent; yea, though such a judgment be had: yet because the judgment in that case is not, that hee shall recover

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the ſumme due for rent, but onely that he ſhall have a returne to the pound of the cattel diſtrained for the rent, it is queſtionable whether the payment thereupon of the rent ſhall prevent the judgements after had in the ſuits upon bonds. But I think it ſhall; becauſe although it be not an expreſſe recovery of the rent, yet it is ſuch a judgement compulſory for the ſame, as makes the payment inevitable and of neceſſity. And where before we have made the queſtion only between the ſaid Rent-debt, and the debt by obligation: let us now put the caſe between the rent-debt and the debt by ſtatute or judgement. If then the Leſſor, after death of the Leſſee, diſtraine for the rent behind, part of the Teſtators cattel, and after there come a writ of execution upon a judgement or ſtatute of the Teſtators; whether ſhall theſe beaſts in the pound for rent be delivered in execution or not, admitting that, without them, there be not goods ſufficient for ſatisfaction of the judgement or ſtatute? And ſurely I think they cannot be delivered in execution: Firſt, for that they are in the cuſtody of the Law, as in *String-fellow's* caſe, though there the Kings prerogative

See 11. R. 2. Bro. pldges 31 Attainder of the party diſtraind ſhall not take away the diſtreſs. *Vi. Dy.*

rogative overtopped that point; yea, ſo I think, though they be replevied, for that they are to be returned to the pound, if judgement paſſe for the avowant, to which purpoſe ſecurity is given, ſo as they are but in the caſe of a priſoner bailed, who ſtill is in ſome ſort in cuſtodie. Secondly, for that this rent incident to, and deſcendable with the reverſion, breeds a debt of a real nature, and ſo of more dignity and worth then debts perſonal. Thirdly, for that the Land lett (as in a ſort debtor) ſtands chargable with this diſtreſſe from the very time of making the Leaſe, as either by contract real of *quid pro quo*, or rather, by an operation of Law or Legal conſtitution, or ancient cuſtome of the Realm, without any contract of perſons. Laſtly, for that the Leſſor doth not diſtraine the cattel therefore, or in that reſpect, for that they are or were the goods of the Teſtator, but for that he found them levant and couchant upon the Land which muſt afford his rent, or a diſtreſſe for it if behind; ſo as if they had been any under-tenants or ſtrangers Cattel, they might have beene diſtrained. Some may perhaps object this

this reason why these impounded cattel should be delivered in execution, *viz.* for that where otherwise the creditor by statute or judgment should lose all or part of his debt, yet by this relief done to him shall not the Lessor lose his rent, for that he may at any time after distrain any goods or cattel found upon the ground at any time during the continuance of the Lease. But here, besides the point of delay and stay for this rent, which to many is the sole meanes of maintaining their housholds and families; this further is considerable, that perhaps the lease may be neare expiring, perhaps so highly racked and rented even to or above the value, as that the Executor having his Testators stock taken from it and him by execution, will not stock it any more and so the land lying fresh, if the Lessor shall lose the benefit of his former distress, he shall be perhaps without remedy for his arrerages of rent. And if the case were of a distress for rent behind after the Testators death, I conceive though not so strongly, for most of the reasons abovesaid, that the Law would be all one as in the other case; for though in this case respect shall not be had to the Executors

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losse upon whose goods the Law casts this debt, though not the other, yet here the point of losse must fall either upon the Lessor losing his distress, or upon the other Creditor by specialty or record, losing wholly, or in part, his debt. And in respect of this locall tye upon this Land, for payment of the Rent, whereto even the fealty of the Lessee, and tenure of the land bindeth him, I think no act that the Lessee can do by entring into bonds or Statutes, or having judgment against him, can hinder the lessor or reverfioner from taking his remedy upon this leased Land, for the Rent therefore due; but rather, any other Creditor shall be a loser in his debt. Doubtless, if in barre to the avowry for this Rent due, either before, or since the Testators death, the Executor will plead, that the Testator was indebted 1000 *li.* by Statute, Recognizance, or Judgment, which is more then all his goods amounted unto, it will be no good plea, but may be demurred upon. What if he plead so much debt of Record to the Crown? Surely, I doubt whether this plea will be allowed in any other Court then in the Exchequer; yet if these arrerages of Rent shall be levied upon

Vid. Bro. Pledg. 31.

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the Land, ſo as either the Executor muſt pay it, or loſe the cattel diſtrained by a returne irrepleviſable, and then ſhall not have ſufficient to ſatisfie the debt to the Crowne. I ſee not how he ſhall well eſcape, when purſued in the Exchequer to make up this Crowne-debt out of his owne purſe, which is hard. For this we may pitch upon as a *Maxim* and principle, that an Executor, where no default is in him, ſhall not be bound to pay more for his Teſtator, then his goods amount unto. Again, it is a rule, that where nothing is to be had, *viz.* juſtly to be had, the King loſeth his right: and our books tell us, the Kings Prerogative muſt not do wrong, *Poteſtas ejus, juris eſt, non injuriæ: nam poteſtas injuriæ, non eſt Dei, ſed diaboli.* On the other ſide, it may be ſaid, that if Land Leaſed come to the King by graunt, outlawry, or otherwiſe, the rent reſerved, cannot be diſtrained for, and therefore it is not very unreaſonable nor incongruent that the Kings intereſt for his debt ſhould make the diſtreſs of a ſubject ſtand by and give place. This therefore among other of the premiſes do I leave as a *Quære*: nor is it altogether unprofitable

So *Bracton.*

fitable either for an Executor, or Creditor to know what wayes and paſſages, what caſes and contingents be doubtfull and hazardous. And if in theſe unbeaten pathes, where our bookes and relations have held me forth no light, expreſſe, or particular, I have erred in miſ-reſolving, or miſſing to reſolve, I hope I ſhall without difficulty obtain pardon. Not reſolving.

Now let us conſider of aſſumptions or promiſes made by the Teſtator upon good conſideration; the performance whereof or making recompence and ſatisfaction for not performing, doth lye upon an Executor as before is ſhewed. Theſe therefore are to come behind and give place anto all the former, ſo as an Executor this way or for theſe ſued, may plead debts by ſpecialty, rent, &c. amounting to the whole goods. And yet theſe debts by contract or aſſumption expreſs are to be ſatisfied before Legacies be to be had. Firſt, becauſe by the common Law of the Land thoſe are recoverable, and ſo are not Legacies: next becauſe, as our bookes ſpeake, it concernes the ſoul of the Teſtator to have *as alienum*, all duties and debts to other men, ſatisfied before the debtors voluntary gifts or be- Co. lib 9. fo. 88. b. Doct. & Stu lib. 2. cap. 10 & 11.

queſts

queſts. Alſo theſe debts by aſſumption or ſimple contract, are to be ſatisfied before the reaſonable part of the wife or children, to which by cuſtome in ſome Counties they are intitled, ſee 21 *Ed.* 4. 21. & 2. *Ed.* 4. 13. & 2 *Hen.* 6. 16. And note that in ſuch an action upon the caſe it is not of neceſſity to lay or ſet forth in the declaration that the defendant hath Aſſets to pay all debts by ſpecialty, and this alſo; but if there want, the defendant muſt alledg that in his excuſe, for elſe it ſhall be preſumed that he hath aſſets. So alſo in an action upon a caſe grounded upon the Executors own aſſumption to pay his Teſtators debt: and yet, as the L. *Cooke* conceives, and upon good reaſon as to me it ſeemes, if the Executors ſo promiſing had not aſſets ſufficient in his hands to pay this debt promiſed, he pleading *non aſſumpſit*, may give that in evidence, for then the conſideration faileth, as alſo if there were no ſuch debt due, ſince the plaintiff could not have recovered if he had ſued, and ſo his forbearance to ſue was no valuable conſideration.

Co. l. 9. fo. 90. b. Pincon's caſe and fo. 94. Danes caſe.

CHAP.

CHAP. XIII.

Of Devaſtation or Waſting.

THat which St. *Paul*, of diſpenſers ſpiritual (who are as it were the Executors of the laſt Will and Teſtament of our Saviour Chriſt) doth ſay or enjoyn, *viz.* that they muſt be found faithful: The ſame is required of theſe leſſe or inferior diſpenſers, the Executors of mens Wills: and hereof they are to be regardful, not only in reſpect of eſcaping damage to their own eſtates; but more eſpecially in reſpect of an oath which divers of our Books mention to be taken by Executors. And in one of the Books of relations of Caſes in the twentieth year of *H. 7.* his time, there is an expreſſion of three things, whereto the Office of an Executor tieth him. 1. To do truly, and thereto are they ſworn, ſaith this Book. 2. To be diligent, *viz.* with ſedulity to attend the diſcharge of the truſt. 3. To do lawfully; nor well can this latter be without knowledge, what is lawfull

or required by the Law. Now what is formerly ſaid of the right method and order of payment of debts, diſcovereth in much part how, and by what wayes, an Executor may waſte and miſpend his teſtators Goods, and conſequently incur a devaſtation, and ſo make his own Goods liable. But of that more fully and particularly by it ſelf, and herein we will conſider of theſe parts.

1. What ſhall be ſaid to be a waſting or devaſting, and how many wayes that may be done.

2. Who ſhall by this act be charged to yield recompence.

3. Who ſhall take the benefit or advantage of it.

4. How far, or in what meaſure, he advantage ſhall be taken.

5. What way, or by what meanes, it ſhall be had.

As to the firſt: this waſting is done divers wayes. 1. By the Executor his plain, palpable, and direct giving, ſelling, ſpending, or conſuming the Teſtators Goods after his own will, leaving debts unpayd. 2. By paying what is not to be payd, which yet is to be underſtood, where there are debts payable and unpayd.

payd. 3. By the way formerly diſcourſed of, *viz.* the not obſerving the right method, and order of payment. 4. By aſſenting to a Legatees having a thing bequeathed, debts being unpayd. 5. By ſelling Goods of the Teſtators at an undervalue, for (be the appraiſement what it will, and let him ſell for what he will) he muſt ſtand charged to the beſt and utmoſt value towards the Creditors. Yet if upon a judgment againſt the Teſtator or the Executor, the Sheriff ſell ſome of the Teſtators Goods at an under value, this is no vaſtation of the Executor, for this difference *Hody* chief Baron makes. But ſince an executor may haply prevent this act of the Sheriff, by paying the due ſum upon ſale of the teſtators goods at the beſt value or otherwiſe, he is to be blamed to leave it to the conſcience of the Sheriff or Under-Sheriff rather. 6. And laſtly, this may be done to the executors ſmart by undue, *viz.* not legal diſcharging of any debt or deputy pertaining to the teſtator, and that divers wayes requiring heedfulneſſe. As if an executor upon a bond of two hundred pounds forfeited for payment of 100l. accept the principall, or perhaps alſo ſome uſe, coſts, or damage,

and give a releaſe, or acquittal of the whole forfeited bond, or of all actions, or upon Record, acknowledge ſatisfaction upon judgment had. This is a waſting of ſo much as the penal ſum is more then is received, and ſo far his own goods ſtand liable to Creditors not ſatisfied; and ſo doubtleſs is it, if he do but give up the Bond, having no Judgment upon it, though he neither make Releaſe, nor acknowledge ſatisfaction. But his verball agreement to require, or ſue for no more, or his giving a note of receipt for ſo much as he hath received, or delivering of the Bond into a friends hands, or into a Court of equity in way of ſecurity to the debtor, that he ſhall not be ſued for more, is no Devaſtation, ſince ſtill the reſt in Law remains due and ſuable. So this ſets no more upon the Executors ſcore then he received. But let him take heed of releaſing, except he be ſure there be no other debts demandable. Not onely is there danger in releaſing of debts, but of treſpaſſes, or other cauſes of action alſo. As if one take away goods from the Teſtator, or from his Executor; If the Executor make him a Releaſe, this is a Devaſtation, and makes his own goods liable to the

13 E. 3. *Fitz.* 91.

Yet on the other ſide, if an Executor by payment of a 110 l. get in a forfeited bond of 200 l. it ſhall be an admiſſt. but of 110 l. 27 *H.* 8. 6. p. *Fitz. inſt.*

the whole value of the goods releaſed, as appeares by *Ruſſels* Caſe, where the releaſe of an Infant Executor to one who had taken and committed to his uſe Jewels and goods of the Teſtator, being pleaded, the Releaſe was therefore held void in reſpect of nonage; for that if it ſhould have ſtood good, it had amounted to a *Devaſtavit*, and made the Executors own goods liable; which, his infancy conſidered, had been hard. Another way of diſcharging, dangerous to *Executors*, is ſubmitting matters of debt or duty, or touching goods taken away, to arbitrament. For if by the award of the Arbitrators the debtors or wrong doers be diſcharged or acquitted without making full recompence, the reſt of the value will (as to other Creditors) ſit upon the Executors skirts, becauſe it was their voluntary act thus to ſubmit it to arbitrators. Thus may Executors fall under prejudice, not onely by wilful waſting, or unfaithful miſcarriage, (wherein they are not to be pitied) but through incogitancy and unskilfulneſs alſo. Nay, I may ſay truly, that it is very hard for Executors in ſome Caſes, to walk ſafely: for beſides that, to find out all judgments & recognizances, by or againſt

their Teſtators, is of ſome difficulty more then for Statutes, whereof by ſearch in an Office deſery may be had; yet with this difference, that Statutes Merchant, and Statutes ſtaple may be, and ſtand effectual againſt executors, though not inrolled; albeit againſt purchaſers of the Conuſors Land they be not of force, if neglect be of inrollment within three moneths. But where Statutes or Recognizances lie for performance of Covenants upon ſale or Leaſe of Lands, Marriage, Agreements, or otherwiſe; how hard is it for Executors, to know whether any Covenant be broken or not; how hard to be ſure they find out all bonds, bils, Covenants, and Articles in writing, made and kept by others, whereby any mony is due and payable before debts by contract or Legacies; as alſo all promiſes, or debts by Contract payable before Legacies? For the Law hath preſcribed no time for their claim and demand, & whether ſome ſuch thing or mean of publication were not fit to be enacted, let the judicious conſider. To attain to this knowledge of the teſtators debts, I remember, that it is by the Lord *Brook* reported, that in King *Hen.* the 8. his time, Sir *Edmund Knightly* being exe-

cutor

cutor to Sir *William Spencer*, made Proclamation in certain Market Towns, that the Creditors ſhould come by a certain day, and claim and prove their debts; but he for this was committed to the Fleet, and fined. For that none may make Proclamation, ſaith the Book, without Warrant or Authority from the King, except Maiors and ſuch like Governours of Towns, who by priviledge or cuſtom may ſo do. But the dangers are onely where there is not ſufficient of the Teſtators Goods and Chattels, to ſatisfie both debts and Legacies. For where there is ſo, the Executor is not in any ſuch hazard as aforeſaid. This deſcry of danger may breed caution, and *Qui timent cavent, & vitant.*

As to the ſecond, we ſhall have in conſideration two ſorts of perſons, *videlicet*, 1. His executors, there being many times divers executors, and the waſte or devaſtation done but by one. Next the executors own heirs, executors and adminiſtrators, *viz.* whether he dying, this act ſhall fix upon them like charge and burden for ſatisfaction, as upon himſelf ſhould have lien, in caſe he had lived.

Touching his Companions, though all

together make but one Executor, yet the miſ-doing of one ſhall not charge the reſt, nor make their Goods liable to recompence: as both appeares by the Book of Entries, and was alſo held in the time of *Henry* the ſeventh, *Anno* 12. of his Reign. Yea of the ſame opinion were the Judges twice in the late Queens time, *viz.* firſt in a Caſe between *Walter* and *Sutton*, in the Common Pleas, and ſhortly after in the Kings Bench, in a Caſe between *Hankeford* and *Metford*; though theſe two Caſes be not reported in Print. And ſurely this ſtands with rules of Reaſon or Juſtice, that each ſhould bear his own burden: If it were otherwiſe, many would decline, and abandon executorſhips, as very dangerous to the moſt honeſt and faithful, in caſe they were ſubject to wracking by the miſcarriage of their Colleagues.

Lib. Intra. fo. 327. Kelw. rep. fol. 23. So. 11 H. 6. 38 a. 4 El. Dy 210. a. the Writ ſo iſſued againſt the waſter only. P. 4. H. 8. rot. 303. Tr. 34 Eliz. Paſ. 36 Eliz.

As for the Executors or Adminiſtrators of the waſting executor dying before he have born the burden of this miſ-doing, I have found contrary opinions, even in the late Queens time. For firſt, in the *Exchequer*, it was conceived to be as a treſpaſs dying with the perſon, as coming within the Rule, *Actio perſonalis moritur*

cum

cum persona. But in the said case of *Walter* and *Sutton*, the court of Common pleas was of contrary opinion, *viz.* that this was not escaped by the death of this misdoer, but the law would pursue his executors or administrators, and lay upon their backs the burden of recompence or satisfaction; for that the testator or intestate, doing this wrong had made himself to be debtor in the first testators stead, and therefore they who represent his person must with his goods make amends and supply; and this later opinion was something in time after the former. Also, between these two times was there an opinion in the said Court of common pleas agreeing in part with this later: For there a judgment being had against an Executor, and the Sheriff upon the *Fieri fac.* returning that there were no goods of the Testator in the Executors hands, and then this executor dying, A *Scire facias* upon a suggestion of Devastation by the said Executor deceased, was awarded against his Executor, and that upon good debate, and shew of a President lef, and reported by M. *Jevour*, in King *Hen.* 8. his time. And it was then said to have been clear, that if a Devastation

Mich. 31 & 32 Eliz. Tr. 34. Eliz.

Tr. 34 El.

Mich. 32. & 33 Eli.

on

one had been returned in the lifetime of the ſaid waſtful Executor, his Executor then ſhould have been charged. All the doubt was, for that here that was not done in his life time; yet at laſt affirmatively (as above is ſhewed) the reſolution was.

Touching the third point, *viz.* To whom the advantage of waſting ſhall accrue, or who by reaſon thereof ſhall charge this waſting Executor. Put we the caſe, the Teſtator ſtood indebted to A by Statute, and to *B.C.* and *D.* by ſpecialty, not of record, as Bond, Bill, &c. and the Executor having no more in Aſſets then onely an hundred pound, and this all being due to *D.* he payeth him the whole hundred pound, not having any thing left to ſatisfie any of the reſt of the Creditors: hereby wrong is done to none but *A.* who was a Creditor by Statute, and therefore he only ſhall make this Executor to pay the like ſumme out of his owne goods, ſince as to him onley this is a devaſtation, or that it was at his election to pay off the one Creditors, which he would, no ſuite being commenced by any of them, conſequently no wrong was done to *B.* nor *C.* And if no

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ſuch debt had been by Statute, but all had been Creditors by ſpecialty, and *A* onely had commenced ſuit, and that known to the Executor; now if after, he payed all to *D.* he ſtands only as to *A* lieable in his owne goods, and not to *B* nor *C.* But if the Executor had onely paid a Legacy or debt by contract, leaving nothing for ſatisfaction of the debts by ſpecialty. then had he ſtood equally lyable to each of the other Creditors, *Capiat qui capere poteſt*, viz. he who firſt could recover, or by the voluntary act of the Executor, could obtaine payment, muſt be preferred, if the ſumme would reach no further. For it ſhall by this miſpayment or miſconverſion ſtand with the Executor, as if he had not payed it nor departed from it at all upon the matter: and therefore I doubt not but it is free for him to give the advantage of this his error, to which creditor by ſpecialty he will, ſo as he ſhall ſtand free from all the reſt, no ſurpluſage remaining, nor any creditor of record being. For if there be any debt upon record, the Executor ſued by a Creditor upon bond, may notwithſtanding this his waſting, plead in Bar of this ſuit, that there is ſuch a record of a debt not ſatisfied

If upon fully adminiſtred pleaded to one, *vel aliter*, he have the advantage of this waſtation, taking up the whole ſum waſted, *Quæ.* now the Executor ſhall receive himſelfe againſt another.

tisfied, and that he hath no more then that debt amounts unto, and ſo admit ſo much ſtill in his hands as he hath miſ-adminiſtred, though in kind it be not in his hands, but miſpent, or unduly payed, as aforeſaid. And what is before ſhewed of the Statutes precedency before Bonds, in taking the advantage againſt an Executor for devaſting or waſting; the ſame is to be underſtood of precedency of Judgements before Statutes, and of debts to the King before Judgements, &c.

As touching the fourth poin, *viz.* how far the Executor thus waſting ſhall incur damage or make his own goods liable: Doubleſſe, no further then the value of the Teſtators goods waſted or miſ-adminiſtred. Therefore if one have advantage thereof to the full ſumme, no other after ſhall: for he is no further a treſpaſſer or wrong doer, nor is the Teſtators eſtate any further, or deeplier damnified. And as damages for treſpaſſe are to be proportioned to the value of the wrong done, and loſſe ſuſtained; So alſo in this caſe the Executor by his miſdoing, doth not draw upon himſelf his Teſtators whole debts, but ſo much only as the goods amounted to, which he did miſ-

miſ-adminiſter, and which ſhould have gone to the payment of the Teſtators debt, if he had not ſo miſguided himſelf in the office of Executorſhip; which default he muſt repair or make good. And this proportion ſeems to me proved, by the Caſe in K. *Edw.* 3. where the value or quantity is found, eſpecially of the goods adminiſtred wrongfully, though there by a wrongful perſon: and in *Suttons* Caſe it was expreſly held, that each Executor ſhould anſwer for ſo much as he waſted. 41 E. 3. 31.

Now for the fifth and laſt point, *viz.* how, and in what manner relief ſhall be had upon this point of waſting, for him to whom it pertains: Firſt, this is to be obſerved, that in caſe where the Verdict paſſeth directly againſt the Plaintiff, no Devaſtation can come in queſtion, for that no judgment being for the Plaintiff, no Writ of Execution can iſſue; & therefore, if upon the iſſue of fully adminiſtred, it ſhall appear, that there hath been a devaſtation, which cauſeth aſſets to fail, then muſt the Jury finde, that the Defendant hath Aſſets, and not finde a devaſtation, as was reſolved in the Kings Bench in the late Queens time between *Hankeford* and *Metford*, for there the Jury finding. *Paſ.* 36. *El.* in 6. *reg.*

ing a devaſtation, *viz.* a ſurrender of a Leaſe for years, left by the teſtator, it was held void, and nugatory, and was not regarded by the Court, which ſaid, that muſt come in by the Sheriffs returne, *viz.* upon the *Fieri facias*. Thus aſſets being found in the executors hands, judgment is given for the plaintiffe to recover his debt, and to have it levied of theſe aſſets; nor is this finding of them by a Jury againſt truth, though they be waſted, and ſo not to be had in kind: for the executor hath them in right, ſince he hath not rightfully parted from them, according to the rule, *Pro poſſeſſore habetur qui dolo* (or *injuria*) *deſiit poſſidere*. As in the caſe firſt put, this waſting cannot come in queſtion for want of a judgment for the plaintiff; ſo alſo where the judgement it ſelf extendeth to the executors owne goods by reaſon of ſome falſe plea, whereof we ſhall after conſider: for ſince that the conſequence and effect of a vaſtation is but to make the executors own proper goods liable to the debt of the Creditor this is altogether needleſſe where the judgement it ſelfe hath laid hold on his goods. But now in caſe where the judgment extends onely to the Teſtators goods

goods in the Executors hands, let us find the way to relieve the Creditor, in case the Testators goods be wasted by mis-administring or otherwise; for hereabout the right way hath often been missed, and again easily may be. In the latter end of the late Qu. time, this course was taken, *viz.* the Sheriff returning generally, that the Executor had no goods, a surmise was entred, that the Executor had converted to his own use the Testators goods, whereupon a Writ was awarded to the Sheriff, to enquire thereof by Jury or Enquest, which he did, and returned, that it was found, that the Executor had wasted the goods; and thereupon a *Scire facias* was awarded against the Executor, to shew cause why Execution should not be of his own goods, and upon two *Nihils* returned, Execution was so awarded; but a Writ of Error was hereupon brought. And although it were said for defence of that course, that it was usual in the Common Pleas, and more favourable then the other course, where the Sheriff onely returneth the wasting, or is sole Judge thereof, whereas here it was found by an Inquest of Jurors, and thereupon a *Scire facias* awarded; yet did the Court resolve

45 El. *Portiers* Case. Co. lib. fol. 32.

resolve the contrary, and reverse this Execution as erroneous: For it was said, that upon the Sheriffs return of *Nulla bona, viz.* that there were no Goods of the Testator to be found, the Plaintiff should have a special Writ of *Fieri facias*, willing the Sheriff to levie the sum recovered, either of the goods of the Testator; or if it could appear, that the Executor had wasted the Testators, then to levie it of his own goods; and this way, as was said, the Executor hath good remedy by action against the Sheriff, if without just cause, he levie it of his Goods; but the other way, *viz.* When Inquest is thereupon taken, the remedy fails, since neither the Sheriff doing according to the Inquest, can be punished, nor the Jurors finding falsely, are subject to any attaint, it being no Verdict upon Issue joyned, but an Inquest of Office, which excludeth also all challenge of Jurors. And whereas that Book mentions the Sheriffs subjection to action only in Case of his mis-feasance or doing wrong, I conceive that he is likewise suable for omission or nonfeasance in this Case, *viz.* for not levying the debt upon the Executors own Goods, where proof is made

So 9 H. 6. f. 9

See *Paston*, 11 H. 6. 16. 36. upon surmise that *A.* hath wasted. *A Fieri Facias* may issue against his goods only. If so, *&c.* So *l. b. Int.* fol. 11.

of

of his waſting. And where the Book mentions this *Fieri facias* to be in this manner upon the Sheriffs return in a *Scire faciat*, doubtleſs, the Book therein is miſ-printed, and ſhould be a *Fire facias*, for in a *Sci. fac.* the Sheriff can return nothing, but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the courſe there preſcribed, that firſt a general *Fieri fac.* go out, and that thereupon the Sheriff return generally, that the Defendant hath no goods of the Teſtators, and that thereupon, the ſaid ſpecial Writ is to iſſue; yet in the beginning of the late Queens time, the Verdict paſſing for the Plaintiff upon the iſſue of fully adminiſtred, the Sheriff was not permitted to make ſuch a general return of no goods to be found of the teſtators, but was inforced by the Court upon good adviſement, either to levie the debt, or to return a *Devaſtavit*; and ſo was done at laſt by the Sheriffs of *London*, much againſt their mindes; and thereupon went out a Writ to levie the debt of the Executors own goods, firſt in *London*, and after into *Devonſhire*, upon a *Teſtatum* that the Executor had goods there: and it was there ſaid, that

2 *El. D.* 185 Woodw. and Chicheſters Caſe.

if no Goods could be there found, then the Plaintiff might have a *Capias* to take the Executors Body in Execution, or an *Elegit* for the moyety of his Lands. But certainly, I cannot finde (except with a difference) how this course of inforcing the Sheriff to do one of these two, can be just; as neither could Justice *Fulthorp*, in the time of K. *Henry* the sixth, approve it. For a Jury of one County may finde Assets in another County, as was resolved in the time of K. *Henry* the 8th, which yet was understood of Goods moveable, and not of Lands. This then thus being, if a Jury of *Kent* find assets which be in *London* or *Essex*, how can the Sheriff of *Kent*, where the action was laid, leavie the debt recovered by, or out of these Goods; or since he cannot, why should he be compelled to make a false return of a wasting; when the Goods remain unspent and unwasted in another County? Why rather should he not be suffered to return according to truth, that there is nothing within his County or Bayliwick, whereof the debt may be levied, since even his Oath tieth him to make a true return? Nor is this contrary to the Verdict, finding assets generally; and

11 *H.* 6. f. 28
26 *H.* 6. *Dy.* 1. Yea Co. *lib.* 6. f. 47, 46. Assets in *Ireland*, or elsewhere beyond the Sea, may be found by the Jury where the Action is laid.

For the Pl. may, if he will, suggest, the being of Assets in a forreign County, and this is usually done. See *lib. Intr.* 11 a. Action upon the Case for a false return of Devastit. *contra fact. fuit debitum.* 28 *H.* 8.

and this so returned upon a *Testatum*, the process may be directed into the right County. But in the said case it was replied to the plea of fully administred, that there were assets in *Essex*, the action being laid in *Middlesex*, and yet as it seems by the Book, the trial was to be by a Jury of *Middlesex*, which, saith the Book, may find the assets in *Essex*; but there the plea was demurred upon, and held a good plea which proves, that although the transitorines of the assets make them subject to the notice of a forreign Jury, yet is it not like an act transitory, and not local, for that must be pleaded to be done in the place where the action is laid, though in truth not so. But had Issue been joyned upon the point, me thinks it should be tried in *Essex*, where the assets be laid; the rather, for that perhaps they may be real Chattels, *viz.* Lands leased to the Testator, or other Lands of him appointed to be sold for payment of debts, which as heretofore hath been held a Jury of another County cannot finde. Besides, although such a forreign Jury may find other movable assets, yet is it at their election, they are not thereto compellable, as elsewhere is holden. Here then

2 *Ma. Bro.* Attaint 104. and 10 *El. Dyer* 271. Because local & fixed, otherwise held, 2 *Jac.* in com. b. Co. *lib.* 6. f. 46, 47. 22 E. 4. 5. & 2 Ma. Bro. Att. 104. 18 *H.* 7. *Kelw. rep.* 51. a. So held, p. 3 *El.* in *Scacear.*

may be the difference, *viz.* that if the aſſets be found to be in the County where the trial is, there the Sheriff of that County cannot return *Nulla bona*, without adding, that the Executor hath waſted: but if there be no Verdict at all touching aſſets, judgment paſſing againſt the Executor upon a demurrer, confeſſion, *Nihil dicit*, or the like; there may the Sheriff make ſuch a return of *Nulla bona Teſtatoris*, without returning any devaſtation: and to alſo where the Verdict either findeth aſſets generally, not finding in what place they be, or expreſly findeth them to be in another County, as a little before we found, may be done by a Jury of *London*, of aſſets in *Eſſex*.

So if the proceſs for Execution go into another County than where the Verdict found, as the difference was held in *Scac.* 31 *El.* 28 *H.* 8. *Dy.* 30. b. *Paſ.* 4 *H.* 8. *roſ.* 301. 4 *El. Dy.* 210.

In King *Henry* the 8th his time, as a little after, the ſaid *Chicheſter* is by the Lord *Dyer* reported, the Sheriff returning upon the *Fieri facias*, that the Executors had no goods of the teſtators, did add in the ſame return, that one of the two Executors had waſted, and thereupon a *Sci. fac.* was awarded againſt him, & upon *Sci. feci* returned, & default made, Execution was adjudged, and awarded againſt his goods only, and this courſe of *Sci. fac.* both the L. *Dy.* (as elſewhere I find it reported) & *Priſcot. temp. H.* 6. approved. But

But, *H.* 6. 12. without any *Sci. fac.* upon the devaſt. returned, a *Capias* was awarded by the Court; and ſee 9 *H.* 37. Bro. Ex. 57. & *lib. Intr.* 220. A *Fieri fac.* abſolutely and without condition.

I

I am perplexed with doubt what ple[a] the Executor coming in upon the *Scire facias*, could plead; for except his deniall of waſting might be pleaded contrary to the Sheriffes returne, and put in iſſue, ſo as to cauſe a new triall after a former, perhapss. preceding judgment, which I think would not be admitted; then his coming in is to little purpoſe for ought I can conceive. Here again it muſt be obſerved that in the caſe of *Chicheſter*, the judgment was had upon triall of fully adminiſtred; but in the other caſe in the time of King *Henry* the eight, it was upon confeſſion, which is all one, as I take it, with condemnation upon *Demurrer*, or *Non ſum informatus*, or triall upon *Non eſt factum*, to the Bond, or a releaſe to the Teſtator, or the like. Now between all theſe, and that of *Chicheſter*, there is a broad difference: for there the defendant being convinced by verdict to have aſſets, which if they continue not in his hands in kind, muſt be anſwered out of his own goods as waſted, therefore the *Fieri fac.* to levie the debt of the Teſtators goods if any found, or in default thereof out of his own goods, is very agreeable, & purſuant; but in none of the other caſes is there any ſuch triall or conviction of the defen-

[a] 9. H. 4. 9 5. A manuſcript report. 36 H. 6. 3. and Mordant. 12. H. 7. Kelw. rep. 24. But Vavaſor Juſt. and all the other Serjeants ſe cont. 2 El. D. 185.

dants having assets, so as it rests *æque dubium*, whether they have assets or not, and therefore it may seem somewhat hard and harsh, to send out such a Writ in that Case, and so should I have thought, if I had only seen the report of *Pettifers* case; But looking in o the Record, & finding the condemnation there to be by *Nihil dicit*, in effect, I cannot uphold any distinction of course, in respect of the said difference of Cases. Nor indeed doth that course there directed, presume that the Executor either hath assets, or hath wasted them, but commands, that if assets, *&c.* then the levying shall be one way; if wasting, then another way, so if neither *Nihil fiend.*

Co. lib. 5. fo. 31 Mic. 41 Eliz. rot. 2. 4. Co. lib Intr. 266. b. A recovery of debt precedent was pleaded: Pl. replied *null tiell Record*, and Defend. would not maintain his plea. *Ideo condemp.* If neither, he must so return and do nothing.

CHAP. XIV.

Of an Executor of his own wrong.

TO begin with some definition, or description of this man; He is such as takes upon him the Office of an Executor by intrusion, not being so constituted by the Testator or deceased; nor for

want

want of such constitution substituted by the Ordinary to administer. Touching whom, we will consider in these parts, and with this method, *viz.*

1 What acts or intermedlings of such an one not being Executor nor Administrator by right, shall make him to become an Executor by wrong, *vide* five more, *per stat.* 43 *E. cap.* 8.

2 In what manner, and by what name such shall be sued; specially when another, then he is Executor or Administrator, or himself after such act becomes Administrator.

3 How far he becomes liable to Creditors, and how, and to whom.

4 What acts done by him shal stand firm as if he had bin an Executor by right.

5 See a late stat. 43 *E. cap.* 8 hereabout.

As to the first, it was in the time of Queen *Mary* doubted, and not resolved, Whether the onely seising, and taking into ones hands the goods of the deceased, did make one Executor of his own wrong, without any further act. And in the beginning of the late Queen's time, the L. *Dyer* said, that the possession, and occupation of, or medling with the goods, is that which gives notice to Creditors,

1 & 2 P M. *Sod Dy.* 105. *b.*

1 El Dy. 166 & 167. So also *Balk.* 50 Ed. 3. 9.

tors, whom they are to sue as Executor. But doubtless, Creditors must look further before suit; for else can they not know, whether he so intermedling, be Executor or Administrator; nor consequently, how to found their suit rightly, and safely for good success, since a suit against an Executor as Administrator, or against an Administrator as Executor, will prove ruinous, and fall to the ground. Yea where an Administrator sued as Executor, did not plead, that administration was committed unto him; but generally denied, that he was Executor, or administred as Executor, the Lord *Dyer* held, that it must be found for him, yet left it doubtful; but the clear and safe way had been to have pleaded the administration, *&c.* And in the former Case, the Lord *Dyer* said, that one intermedling only about the Funeral, and laying out money therefore; an Overseer or Conductor, or he who hath Letters of the Ordinary, *ad colligend. viz.* to get and keep the Goods in safety, and one who intermedleth by vertue of a Will truly made, but controlled by a latter Will after found and proved, may free himself from being an Executor of his own wrong, by special plead-

11 & 14 El. *Dy.* 305, 306

1 El. D. 166, & 167. see *lib. Intr.* f. 322. b.

pleading how or in what right he intermedled, and traverſing his adminiſtring in other manner; and that this traverſe need not, nay may not be, was held in the time of King *Henry* 6. and 7. for that ſuch acts amount not to any adminiſtring at all: and where no adminiſtring at all is confeſſed, ſuch a traverſe of not adminiſtring in other manner is diſſonant, and not legall. But let us look back upon theſe ſeverall points exempted by the Lord *Dyer*, and we ſhall ſee ſome cautions neceſſary touching them, and their ſafe entertainment. Firſt as touching the point of burying the dead, it muſt be underſtood to be with ſome expence of the deceaſeds goods, and ſo it is expreſſed in the ſaid book of *Hen.* the 6. his time: elſe for a man out of charity to lay out of his own mony (not intermedling with the goods of the deceaſed) to bury a friend hath little colour to involve him ſo doing in an Executorſhip by wrong; taking the caſe then that ſuch perſon laies out or expends of the deceaſeds goods or mony upon his funerall, heed muſt be taken touching the meaſure and proportion where about; though I can give no particular and diſtinct limit, yet doubtleſſe

12 H.6.28, 10.H.7.28. Yet lib Intra.321 b. where he confeſſed a bout funerall he traverſed alter Lib. Intra. 321. where by letter ad collig. He traverſed; *Abſq; hoc quod &* Exec.

21 H 6. 21.

leſſe either meere neceſſity, *viz.* Church duties, &c. or at leaſt decent ſutableneſſe to his quality muſt be the bounds. And herein to ſpeake, as I think, this latter muſt either be utterly excluded, or held within very narrow compaſſe; for what reaſon, that a Knight or man of higher quality leaving (though perhaps entailed Lands of good value) yet goods not ſufficient to pay his debts, ſhould have an hundred pounds or more of that which ſhould ſatisfie Creditors, ſpent in pompous interring of him for his worſhip, and reputation? Next, Overſeers may onely be excuſed, for ſeeking to preſerve, and keep the Teſtators goods, not in caſe they expend or diſpoſe thereof. So alſo for him who is authorized by the Ordinary to collect, for if he ſell or diſpoſe of any (though goods otherwiſe ſubject to periſhing) it makes him an Executor by wrong, as was reſolved in the late Queenes time, notwithſtanding that by the Ordinaries Letters, he was expreſly directed or warranted ſo to doe; for it was ſaid, the Ordinary himſelf could not ſo doe. As for him who adminiſtred by vertue of a Will, after diſproved, or controled by a Letter, He muſt

Lib. Int. 2 and 9 Eli. Dyer. 255, 256. He told blended Corn, but there he pleaded not the ſpecial matter.

must not doubtleſſe ſtand free, for the goods before adminiſtred, but either as rightfull or wrongfull Executor ſtand lyable to the Creditors. Nor doth every ſuch intermedling by one out of all theſe excuſes, and evaſions as would be an adminiſtration, make one an Executor by wrong. If one doe but take an horſe of the deceaſed, and tye him in his Houſe or Stable, this makes him not an Executor, ſaith *Paſton* a Juſtice; or like acts or intermedlings, as he that delivers to the Wife of the deceaſed her apparel, at leaſt, if it be no more then is convenient to her degree. But if ſhe take, or another deliver more then ſuch to her, ſhe or he becomes an Executor by wrong, But now let us come to a difference, where there is a rightful Executor, and a Will by him proved, or adminiſtration committed, for there ſuch light acts or intermedlings ſhall not make one an Executor by wrong, as where there is no other of right to be ſued. As if one take goods wrongfully from ſuch a right Executor or Adminiſtrator; this (though he convert them to his owne uſe) makes him not an Executor by wrong, but a Treſpaſſer to the right-

1 and 2 P. & M. Dy. 125.

21 H. 6. 28.

33 H. 6. 32. 1 Eliz. Dy. 166. Tr. 37. Eliz. by Fenner Juſt. If one do any ſuch act as pulls the property out of the Executor, he is become an Executor by wrong.

If the goods be aliened by fraud, he who takes them after the Executors death is an Executor by wrong. Tr. 37 Eliz. L. 5. E. 4. 72. a.

rightfull Executor or Administrator, who even for these goods, once Assets in his hands, stands liable to suits or credirors, they being neither lawfully evicted nor rightly administred: but in case, there had been no Executor at that time, or no Will proved, nor administration committed, then such taking of the deceaseds goods into a strange hand had made an executorship by wrong. And thus was the difference lately resolved, as is reported by the L. *Cooke* in the case between *Read* and *Carter* in the Common Pleas.

Tr. 2. Jac. in com. b. Co. lib. 5. 53. & 54.

Yet this further difference was there held, *viz.* that although there be an Executor or administrator by right, yet if a stranger take upon him to receive debts and make aquittances, or to pay debts claiming to be an Executor, he is suable as an Executor by this act: and so also in the late Q. time was held by 6. Just. as touching the receipt of debts and making acquittances, but the book mentions not whether any other Executor then were, or not. But in the point of bare payment of debts *Fromick* makes another difference, *viz.* If a stranger do with his own mony pay the debts of a friend deceased, and not with the debtors: This is

1 Eliz. D. 160. b.

H. 20. 7. 5.

but

but an act of charity, and makes him not an Executor by wrong: otherwise, if with the Debtors money. Yet to this another difference must be added, *viz.* that if he thus paying with his own money, have taken into his own hands goods of the deceased; then is his payment presumed, as by, or out of the value of these goods, and so makes him an Executor by wrong. Contrarily, if he have no such goods in his hands. And in the point of intermedling with, and disposing of the Testator's goods, where another Executor is, this further difference is to be added or understood, *viz.* That where the goods so taken, never came actually to the Executor's hands, but were in a remote place, there this taker becomes Executor. For as it were mischievous to the Executor, if he should by a possession in Law cast upon him, stand chargable with these goods in remote places purloyned, as Assets in his hands; so were it as mischievous to creditors, if neither Executor by right, nor this stranger, as an Executor, by wrong, should stand liable to creditors for them. It is true, that the right Executor may sue and recover damages for them, and that so recovered, shall be

Assets;

Aſſets; but the Creditor hath no means at the Common-Law to inforce him to ſue, and perhaps it may be a cold Suit. And with theſe Additions, I think that late reſolved difference may ſtand firm and ſound. Yet in former times, without ſuch difference the taking onely and poſſeſſion of the goods of the deceaſed, was held to create an Executorſhip by wrong, as *Belknap* ſaid in the time of King *Edw.* the third, and eſpecially if the Act were ſuch as removed the property of the right Executor, as Juſtice *Fenner*, in the late Queen's time ſaid, *Teſte meipſe.*

50 E. 3. *fol.* 9.

Tr. 3 *Eli.*

How, and by what name Suit ſhall be againſt ſuch, and the like.

2. *Point.* TOuching the ſecond Point, *viz.* in what manner Suit ſhall be againſt ſuch: Firſt, in general, this uſurping Executor is not in ſuit to be diſtinguiſhed by name from the right Executor; but to be ſued generally by the name of Executor of the laſt Will and Teſtament of the defunct; and then if he will deny himſelf ſo to be, he muſt plead, that he neither is Executor, nor hath adminiſtred as Executor: Then the Plaintiff muſt

L. 5. *E.* 4. 72. *Co. lib.* 5. 30. 31 & 32. *b.* 21 *H.* 6. 8.

must prove that he hath administred in some such or the like sort as aforesaid. And it hath been divers times held, that where there is a right Executor, and yet another doth administer by wrong, it is at the election of Creditors, either to sue them jointly together, or one, or both of them severally, and by himself. But if where Administration is committed, another also administers by wrong, these cannot be sued together as Administrators: for though one way be an Executor by usurpation or wrong; yet none can come to be an Administrator by wrong, since no other, but such as receiveth that power from the Ordinary can so be; therefore in that Case there is a necessity of suing him a part, and by himself (who so usurpeth Administration) by the name of an Executor.

Co. li. Intra. 154. but 145 *a.* in the Verdict, he is called Exec. *De in uria sua propria.* 39 *H.* 6. 45. 40. 21 *H.* 6. 8 19 *E.* 4. 14 15. 1 & 2 *P.* & *M. Dyer* 165. 33 *H.* 8. 38.

25 *H.* 6. 31.

So if *A.* administer the goods of *B.* not being Executor nor Administrator, and after his such doing, and disposing of the goods, he obtaineth Administration of the Goods of *B.* But the Goods left or coming to his hands since the Administration committed, suffice not without the other debts received or released, or goods sold before to satisfie Creditors: Now

if

R. 3. 20. if any sue *A.* by the name of Administrator, he shall have no further relief then according to the value or extent of the goods left in, or come into his hands, since the Administration committed; and if those be fully administred, he shall get nothing. If they remain unadministred, but amount not fully to his Debt, he must want so much of satisfaction. And if he will be relieved, or satisfied out of the goods before disposed of, he must sue *A.* as Executor of *B.* and so was it ruled and resolved by *Gawdy* and *Suit*, Justices in the *King's-Bench*, in the late Queen's time, *viz. Tr.* 30 *Eliz.* And if this now Administrator will plead in abatement of this action, that Administration was committed to him, and demand Judgment, if Suit shall be against him as Executor, then the Plaintiff must in the Replication, as I take it, set forth the special matter, *viz.* how the Defendant did administer before Administration to him committed. But if one, to whom administration is committed do devast, and this Administration is by Suit repealed, because he was not the next of kin, and Administration is committed to another; now a Creditor who would be relieved out of the

2 *H.* 6. 9. If the Administration were committed before the Suit began, the Writ shall abate, else not, as was of old conceived.

the goods wasted, must sue that first, as Administrator, and not as Executor of his own wrong, said *Popham*, Chief Justice; for he did rightfully administer for that time. *Vid.* 8. 185.

AS for the third, *viz.* how far this executor of his own wrong, becomes liable and obnoxious to suit; consider we these things: 3. *Point.* How far liable to creditors.

First, he becomes subject both to the action of the executor, who hath right to the goods wrongfully intermedled with all by him though it were before proving of the Will, and also to the action of the Creditor, who hath right to the satisfaction of his debt.

Secondly, as touching the measure how far he is ingaged, doubtless, he is not, by his wrongful administring, become chargable with the whole account of the Testators debts; but only so far, and with so much thereof, as the goods which he so wrongfully administred amount unto, (Yet he must look to his Plea, else by it he may draw all sued for, upon himself, as if he deny his being Executor or Administrator.) And this seems to be proved by the Case in the time of *Edward* the third, where he Inquest found *Co. lib. Intr.* 4, 45. *Plus de hab.*

not onely the administring or intermedling by the Executor wrongfully, but found also by direction of the Court (as it seemeth) what the value was of the goods so wrongfully administred, which had not been material, if the Administring of a penny had made one as farre chargeable, as the administring of a pound. Besides, if it be so, that a rightfull Executor wasting goods of the Testator, to the value of 20 l. shall be no further charged than that value, then doubtless, so shall it be also in this Case, for both be wrongful Administrations: onely this difference there is between them, that in one Case, the administration is by a wrong person, and in the other Case in a wrong manner. Nay, the Lord *Dyer* doth not stick to call him, who administreth wrongfully, or in undue manner, expresly, an Executor by wrong, in the Case of *Stocks* against *Porter*, though he were rightfully Executor, because he did dispose, or execute wrongfully.

1 El Dy. 167 cap. 12.

4. *Point.* what acts of his of force.

AS to the fourth, *viz.* what acts done to him, or by him, who is an Executor of his own wrong, shall stand firm and good, as done by, or to the right executor.

cutor. Suppose, first, that the deceased were indebted to him 20l. who thus usurpeth executorship, whether may he pay himself or not? And this point was in debate in the Kings Bench between *Coulter* & one *Ireland*, Executor of *Hunt*, where it was strongly objected, that notwithstanding the rightful Executor or Administrator might punish him, and recover against him, for the goods which he administreth; yet another Creditor suing him as Executor generally, and so affirming him to be (for there is no special form of writ or declaration to distinguish an Executor by wrong from a rightful executor) he stands as against him in the state of a rightful executor, and therefore may first pay himself before he pay others; and of that mind at the first were *Fenner* & *Gandy*, Justices: yet did they admit that this payment should not stand good, as against the rightful Executor or Administrator. And *Popham* and *Clinche* held strongly, that neither should it stand good against other Creditors, for then every man would rush upon the Testators goods, & be his own Carver in payment: And whereas it was said at the Bar, that the Lord *Anderson*, upon an evidence at

M 40, 41 E. Co. lib. 5. f. 30.

Guild Hall had ruled it otherwise, *Popham* at another day of debate of the said case, related, that the L. *Anders.* did deny, that he ever so ruled, or was of that opinion; and further informed, that both he & Justice *Walmsley*, *Periam* & *Clark*, Barons, did agree with *Popham* and *Clinch*, in opinion. After which, Justice *Gawdy*, as also *Fenner*, if I mistake not, changing their opinions, and concurring with the rest, Judgment was given accordingly. In the debate of this Case, question was made, If such an executor by wrong, pay a debt to another creditor by specialty, whether this shall not stand firm and good, since he stands liable to Creditors, so far as the goods by him administred do amount, and it was agreed by the better opinion at least, that this should stand firm and good, so as if the payment were out of his own goods, he might retain to himself in lieu thereof so much of the goods of the Testator; for here he doth not, as in the other Case, advantage himself by his own wrong. Yet that opinion allowing this payment to creditors, must, as I think, be understood with this difference, *viz.* that this payment shall stand as against other Creditors, but not as against the

right

right Executor or Administrator, for then any stranger might usurp the office of Executor, and take from him that liberty and election, to prefer which Creditor he will in first payment; yea, might take from the executor, power to pay himself before other, in case there were a debt due to him, which were very unreasonable.

Of addition and alteration by the Statute 43 Eliz. cap. 8.

5. *Point.* WE having considered what the common Law is, and willeth, in the premises: Let us now see what alteration or addition a late Statute hath made. In the last Parliament of the late Queen *Elizabeth*, consideration being had of subtile getting into mens hands, goods of an intestate by Deed of Gift, or Letter of Atturny from one of small or no ability, to whom such subtile contriver hath procured administration to be committed, and so himself would stand free from the suit of Creditors, the administrator himself, either not being to be found, or not being of any value to satisfie Creditors. It was therefore enacted, that every person, receiving, or having any goods or debts

of any Inteſtate, or any releaſe or diſcharge of any debt or duty belonging to him upon any fraud as aforeſaid, or without conſideration of or near the value (except in ſatisfaction of ſome juſt and principal debt, to the value of the goods or debts due from the Inteſtate) ſhall be charged as Executor of his own wrong, ſo far as the value of thoſe goods and debts amount, deducting all principall juſt debts to him due, and payments by him made, which a lawful Executor ought to have payd. Here have we a touch of all the parts precedent, or at leaſt three of them.

1. We have firſt a new Executor by wrong, though intermedling under the title of an Adminiſtrator.

2. We have a limit of the charge by him incurred, ſuitable to our former expreſſion.

3. Laſtly, we have to him an allowance of debts owing to himſelf, or duly payd to others, which is more then we have conceived allowable to another Executor by wrong.

CHAP.

CHAP. XV.

Of Pleas by Executors, *and which be beſt, which moſt prejudicial to them.*

SInce amidſt the Pleas, pleaded by Executors, there is ſuch difference, as that ſome induce one kind of Judgment, ſome another; ſome drawing more loſs and burden upon Executors then others: Let us conſider of the differences, ſo as light may be taken to chooſe the ſafeſt or fitteſt for each caſe.

If an Executor do utterly eſtrange himſelf from the Executorſhip; ſaying, That he was never Executor, nor ever adminiſtred as Executor (for that muſt be added) then if the iſſue be taken upon the Plea & it be found againſt him, the Plaintiffs ſhall have Judgment to recover, not damages onely, but even the Debt it ſelf out of the proper goods of the Executor, if none of the Teſtators can be found to ſatisfie it. And this ſhall be thus not only where it is found, that the Defendant was made Executor by the will, & proved it, & ſo could not chuſe but know it, but even alſowhere

Plea; denying the Executorſhip, 21 *H.*6. 19: 20. *Bro.* 62. 2 E. 4. f. 4. 19 *H.*7. 15. *Lib. Intr.* 322, 333. 33 *H.*6. 33, 34.

he had never proved the Will, whereof he was made executor, nor ever administred by vertue thereof: yea, though he did, before the Ordinary, refuse to be executor of this Will, or to intermeddle with the execution thereof; yet if any other named executor with him, did prove the Will, or did not refuse to be executor, let such other refuser take heed of pleading that Plea. For truth is against the first part of his Plea, *viz.* that he never was Executor; and so the Verdict, which must be *veritatis dictum*, must needs passe against him, and make his own goods lyable as well to debts as damages. What if no other were made Executor but this onely who refused before the Ordinary, may he safely plead that he never was Executor? I think not, since he so was Executor before his refusal, that he might have released all debts due to the testator, and given away all his goods, therefore I think he must plead specially, shewing his refusal, and not generally deny his being Executor. Nay, admit he never was once named, made, or intended to be made Exec. yet having pleaded this Plea, that he never was Exec. nor administred as Executor, if it shall be found by Verdict, that he

He was liable as soon as the Testator was dead.

he did administer or intermeddle as executor, the same blow or burthen falleth upon him; for then the latter part of this plea is found untrue, yea the whole upon the matter, for by this administring he became an executor of his own wrong, and the deniall of this executorship by wrong or usurpation shall be as penall to him as the deniall of a rightfull executorship. The like Law, where the executor pleads a release made to himself, or a paiment of the debt or other performance of the condition made by himself. Nay I find in this later case the judgment entred generally against the defendant, as against another, for his own debt, not being executor. And the reason why the Law makes these so penal to an executor is, because his Plea is not only false, but the falshood thereof was wilfull, since it must of necessity be known to himself to be so. And lastly, for that al these Pleas, if they had proved true, had been perpetuall barrs, at least against the defendant: the first indeed had not been a barre against another being in truth executor or administrator. But if the executor had pleaded a release made to his testator, finding such a one among his writings which

But if he did it as Administrat. it is otherwise; yet see that specially pleaded Co. lib. Intr. 148. a.

See Co. lib. Intrac. Judgment so entred. fol. 145. b. *Read.* and *Carters* case.

Co. lib. Intr. 29 a. not first de bonis testatoris si, &c.

See Bor. Ex. 22. these reasons for this diff.

33 H 6. 23. 24.

which yet was either forged, or never both ſealed and deliverad by the plaintiff as his deed; or if he plead paiment made by his Teſtator, neither of theſe Pleas found againſt him ſhall cauſe the Judgment to faſten upon his own goods: ſo if he denied the Bond or Bil, whereupon the Suit is grounded, to be the teſtators deed. For in all theſe caſes the truth being not known to him, he might honeſtly and reaſonably conceive it to be as hee did plead. But what if hee plead fully adminiſtred, and this bee found againſt him, which reſted in his owne knowledge? ſhall not this falſe Plea expoſe his owne goods in defect of his Teſtators, to the ſatisfaction of this debt? No it ſhall not for hat though this were a falſe plea, and that within his own knowledg, yet was it not; a perpetual bar, for if it had been ſo found as was pleaded, yet aſſets coming after to the hand of the Executor, the plaintiffe ſhould then have relief and ſatisfaction out of theſe ſince accrued aſſets. If any ask, how aſſets may after come, I will give him two or three inſtances. Firſt, it may be by recovery of debts before withholden, or of damages for goods taken away,

So of other perform, Co. Lib. Intr 3. 3 and 6 E. 4. 1. 7. E. 4. 8. See Bro. ex. 22. that the Book contrarily reported 34 H. 6. 22, 23. is erroneous, as was deſcried by Fitz. and al. 23 n. 8. the Record being not ſo as the book ſaith the Judgment was.

or

or by voluntary payment of a debt not before due, for that the time of payment was not come. Secondly, if the Testator having a Lease for twenty years, did demise the same to *I. S.* for the whole terme, if he so long should live; if he were alive in time of the former verdict, but now is dead. the terme continuing, this is now Assets which before was not, whilst it was but a possibility of a terme. Other instances might be given, but these may suffice. If the Executor pleaded that the Testator stood bound in such a statute, or that there was such a judgment against him of debt to the King beyond the satisfaction whereof the goods would not reach: This is in effect a fully admistred though special, and not general, and the Law is a like (as I take it) in all these cases as to the not making of the Executors goods lyable. But in all these cases though the debt shall not be adjudged upon the Executors own goods, yet the damages shall, in default of the Executors goods to satisfie them. And in these cases, it is not materiall whether the judgment passed upon triall or demurrer. Nay if the defendant Executor plead no plea, but confesse the action generally, or

Lib. Intr. 148, 149. This good, though the judg. were by non sum inform. and ne rvermeut that it was without coviu.

Co. Lib. Int. 152

11 H. 4, 5. There a cap. ad sat. was awarded for the damages.

But he may I think forbeare so to doe, and to the judgment for partiall that when more Assets come he shall have more. Lib. Intra fol. 223.

or be condemned by *Non sum informatus*, the judgement is the same, *viz.* to record the debt only out of the Testators goods, and the damages of the Executors goods in default of the Testators: What if the Executor defend not, confesse that he have assets to the value of part of the debt, not of the whole? There for so much as is confessed the plaintiffe may pray, and have Judgement presently without damages, and may maintain for the residue of the debt that the defendant also hath assets for the rest, and so goe to triall, as appears both by the Printed book of entries, and another manuscript which I have; But what if this trial passe against the plaintiffe? Shall he then have an additional judgment for damages in respect of the former? I think, he shall have costs, which commonly run, with or in the name of damages; but without a writ to enquire of damages, none being found by verdicts, the Court doth not usually adjudge damages: yet in the book of Entries I find 6*s.* 8*d.* damages assessed by the Court upon a confession in a writ of *Ratione parentum* against Exe. and this hath much affinity with the action of debt; Yea, in the very action of debt where the Jurors for

Fol. 542.

miscar-

miſcarriage after their departure from the Barre were fined, I finde that the plaintiffe renouncing the aſſeſſement of damages by them made, and praying the Court to aſſeſſe the ſame, it was done accordingly: but this was a ſpeciall caſe. M. 28 H. 6. R. 2. 21. Lib. Intra. 329. a.

Whereas we before ſhewed that an Executor denying his Executorſhip, ſhall, if it be found againſt him, pay the debt of his owne goods for his falſe plea; This thereabout occurreth to be added, *viz.* that that is only where the immediate executorſhip of the defendant is denied. For if B. be made executor by A. and B. dying makes C. his executor; now if C. be ſued for the debt of A. as executor of B. executor of A. and he denieth that B. was executor of A. which by conſequence is a deniall of his being now executor of A. yet if this fall out in trial againſt him, he ſhall not in his own goods ſtand liable to this debt; becauſe it is poſſible that he might not know to whom his teſtator was executor. So if A. made B. C. and D. his executors, and E. is ſued as executor of D. the ſurviving executor of A. if E. deny that D. his teſtator ſurvived B. and C. by conſequence whereof he denieth the truth, *viz.* that the executorſhip of A. is de- See lib. Int. 322.

devolved to him, yet ſhall not this found againſt him, charge his own goods; for he might be ignorant of this point in fact, *viz.* Whether *B*, *C*, or *D*, lived longeſt. And here he denied not his own immediate Executorſhip, but a mediate or more remote Executorſhip; and ſo, I think, is the Law, where *C.* being ſued, as Executor of *B*, Executor of *A*; he pleads that *A.* by a latter Teſtament made himſelf Executor, which is found againſt him, ſo as here he falſly pleaded, and pretended himſelf to be the immediate Executor of *A.* and ſo denied the mediate Executorſhip, *viz.* of *B.* to *A.* and of him to *B.* Yet *Quære* of this; for why ſhould not as well his falſe making himſelf an Executor immediate to the indebted Teſtator charge his own goods, as well as his falſe denying of that Executorſhip; ſince both Pleas tend to the overthrow of the Plaintiffs Action, and each equally reſted in the Defendant's knowledg? But this difference is between them apparent, *viz.* That the denyal of Executorſhip, if true, is an utter, and perpetual Bar to the Plaintiff, as againſt him ſo pleading; but the affirming of an immediate Executorſhip, where he was

ſued

ſued as Executor mediate, doth not ſo, if true, but directs the Plaintiff to a better Writ or Action, *viz.* againſt him as immediate Executor to the indebted Teſtator.

Where we have before touched upon the coming of Aſſets futurely to Executors. I think it is not amiſs to conſider a little the form and frame uſual in Pleas of fully adminiſtred, which thus run, *viz.* *Quod die impetr. & plene adminiſtravit omnia bona & catalla quæ fuerunt prad. S. temp. mortis ſuæ, & nihil hab. de bonis, &c. quæ fuer. prad. S. temp. mortis, &c.* Lib. Int. 252.

Thus tying his denial upon the things, which were the Teſtators at the time of his death; What if then the Executor have at the time of this Plea pleaded Goods, which were not the Teſtators at his death, but ſince accrued, as before is ſhewed, or perhaps a Leaſe for years ſold by the Teſtator, upon condition to be void, if five hundred pounds not paid at ſuch a day, which hapning after the Teſtator's death, and default made, the Term returneth: Or, if the Executor by a Writ of Errour reverſe a Judgment given againſt his Teſtator for two hundred

7 H. 4. 39. Bro. 50. This Plea is not good, *per cur.* becauſe ſome may have ſince accrued.

dred pounds, and ſo is reſtored thereunto: May the plaintiffe now reply generally that he hath Aſſets which were the Teſtators at the time of his death? How can the Jury ſo finde, when the truth is not ſo? Surely this caſe is not common, nor can I ſhew a preſident of a ſpecial plea therein. But in reaſon me thinks it ſhould be ſpecially and not generally pleaded and ſet forth in the replication. And in caſe where one, ſued as Executor, denieth that he was ever Executor or adminiſtered as Executor; I find ſomtimes the replication generall, that he did adminiſter without ſhewing wherein or how; and ſometimes ſpeciall, ſhewing what thing was adminiſtred and where. Here note, that the Executor defendant denying (as he muſt) two things, *viz.* 1. That he never was Executor; 2. That he never adminiſtrad as Executor, the plaintiff in his replication is tied to maintaine but the one of them as the truth of the caſe is, that is, if in truth the defendant were made Executor, but never did adminiſter: now it muſt be replied that he was made Executor at ſuch a place, without ſpeaking any thing of his adminiſtring. On the other ſide, if he did ad-

Lib. Intra. 322. a.b. but a place muſt be ſhewed. So 11 *H.* 6. 25. a. *Br.* 62.

adminiſter, but were not made executor, then only the adminiſtring is to be replied; but if it ſhall be found that the defendant had adminiſtration to him committed, and ſo adminiſtred by vertue thereof, then is the verdict to paſſe for the defendant, for this is no adminiſtring as executor, and upon a generall deniall thereof this may be given in evidence, as the Lord *Dyer* reports to have been reſolved. But if the plaintiff do in his replication, maintain both the points, Shall this make his plea double? Me-thinks it ſhould; yet I find it ſo replied, and no exception taken for the doubleneſſe. *Tr.* 17. *H.* 8. *Rot.* 28.

So done *Co. lib. Intr.* 124. b.

Mich. 13. & 14 *El. Dy.* 30.

Lib. *Intra.* 312. b. *Tr.* 37. *Hiz.*

A ſole woman being executor, maketh a deed of gift of the Teſtators goods in truſt, but continueth poſſeſſion of them, and marrieth *I. S.* who alſo hath poſſeſſion of the goods, and in an action of debt by a creditor fully adminiſtred is pleaded: now upon evidence the verdict ſhal paſſe for the plaintiff; for this alienation being fraudulent, was void as to all creditors, and ſo as to the plaintiff the goods continued the teſtators, and ſo aſſets in the defendants hands, as was held in the Kings Bench. If fully adminiſtred bee

pleaded where the defendant hath assets for part, but not sufficient for all; and so it is found: yet shall not judgment be given for the whole, but for part presently, with a further award, that when more shall come to the executors hand, the plaintiffe shall then have further judgement for the rest, so as that false plea doth him no prejudice, but makes him in as good state (the charges of triall excepted) as if he had confessed himself to have part. And I think the plaintiffe upon that confession of part, may pray the like judgment, without maintaining that the defendant hath sufficient for the rest; for if that be not true, why should he be put to the charge of a triall by Jury? Yea, Sir *Edw. Cooke* at the Bar, *Tr. 36 Eliz.* said, that where Fully administred is pleaded, the plaintiffe is not tied to maintain the contrary, but may presently pray and have judgment to recover it when assets shall futurely come to the defendants hands, which was denied by some; but truly me-thinks the Law should be as he said, as well as in the former case, where for the part which the defendant had not assets to pay, it so was done upon verdict so finding. But there, as I conceive

Yet *Finch* 46 *k.* 3 *d.* 9. 10. held the contrary *viz.* that judgment should be of the whole, but execution only for so much, and a *Scire fac.* for the rest when more assets.

See Cooke *l.* 8. fol. 134

ceive, it was not a preſent judgment, but an award that he ſhould have judgment futurely; ſo as after when aſſets come to the defendants hands, the plaintiff muſt have a *Sci. fac.* againſt the defendant, to ſhew cauſe why he ſhould not have execution, but why he ſhould not have judgment, as I take it; yea, where it is found for the defendant, that he hath fully adminiſtred, yet was it held by all the Juſtices, 33 *H.* 6. 23, 24. and by *Priſot* 34 *H.* 6. 24. that when aſſets after come to his hands, the plaintiffe ſhall have a *Scire facias* to have ſatisfaction out of them: but there *Markham*, *Yelverton*, and *Forteſcue* were of contrary opinion, and ſo was the whole Court, 4 *Ho.* 6. *fo.* 4. And it ſtands with great reaſon, that where upon a verdict fully found againſt the plaintiff, judgment is given *Quod nihil capiat per breve*, there he cannot have any writ to execute the judgment for him, but is put to anew action of debt; yet where it is found that the defendant hath aſſets for part of the debt, but not ſufficient for the whole, there it is very congruous, that the plaintiff have preſently iudgment for part, and after when more cometh, then by *Scire fac.* againſt the defendant, obtaine

So 19 H. 6. f. 37. 8 E. 4 fol. 25. See Iudgment .o entred Co. lib. intr. 151. b.

So 7. E. 4. f. 7

judgement and execution for the rest; for here both verdict and judgment were for the plaintiff against the defendant, whose plea, that he had no goods, was false, and so found by the Jury. And this difference was strongly avowed by Serjeant *Hanham*, *Mich.* 33, 34 *Eliz.* and after approved by *Fenner* Just. 36. *Eliz.* none contradicting it: yet a book was cited, that the plaintiffe recovering so much as was found in the executors hands, should be amerced for the residue, which *Popham* Chief Justice denied to be Law.

1 in 21. II. 6 0,41

CHAP. XVI.

Where judgment shall be against the executors own goods, though no plea of the defendant nor vastation do so occasion: and of the severall manners of judgment in severall Cases.

HOw by Wasting, called by us commonly, a *Devastavit*, an executor may draw downe the Execution upon his owne goods, hath formerly been handled and discoursed of; as also, what kind of

of Pleas doe make the Executors owne goods liable to the debt, and what not. Now let us see, where without misadministring or mispleading, yet the nature of the action shall lay the whole debt or thing recovered upon the executors own goods. And this we shall find in some few cases, 1, Where an executor is sued for rent behind after his testators death, upon a lease for years, made to the testator, and by him left to his executor. Here it shall be adjudged and levied upon his own goods, for that so much of the profits as the rent amounted to shall be accounted as his own goods, and not his testators, therefore is he to be sued as well in the *Debet* as in the *Detinet*, where in other cases he is not, but in the *Detinet* onely, being sued as executor. So if any thing delivered to, or detaind by his testator come to his hands, and he still detains the same after the demand, and be thereupon sued in an action of detinue; for this is his own act: Nor in this case need he to be named as executor, for he shall not answer damages for his testators detaining. So if he assume to pay of his testators, having assets, and be sued upon this *Assump.* the which debt is to be recovered in damages,

ges, and that upon or out of the executors own goods; yet is this action and the assumption which is the ground thereof, founded in the Executorship, and his having assets; for if either he had not been executor, or if he had not assets at the time of the promise, it had been *Nudum pactum*, and would not have bound him, nor given good cause of suit. Nay, to goe further, in the case of assumption by the Testator, and suit against the executor thereupon, we find the Judgment in Mr. *Plowdens* Commentary given against the executor generally, as if he had not been an executor, not fixing it upon the testators goods; yet there the very debt it selfe is included in the damages. But contrarily was it after in the seventh year of the late King. *viz.* Judgment given, that as well the damages as the costs should be levied of the testators goods, if so much in value of them were in the defendants hands; and if not, then the costs only of the goods of the executor. And this surely is the righter and more just way; for there is no reason, that upon promise more then upon a bond, the Law should cast the whole debt upon the back and state of the executor. But perhaps the

5 Mariæ fol. 132.

Reads and *Norwoods* case. Cp. lib. Intr. fol. 1. 2.

two

two judgments may be reconciled thus, the latter was given upon a verdict, *Non assumpsit* being the issue, and there the jury assessed damages in certain, *viz.* 253 pounds with the costs. So as here the Judgment was compleat and full, *viz.* to recover the said sum; but in the other case the judgment was had upon a demurrer, so as the damages not being known, it was generally that the plaintiffe should recover his damages against the defendant. *Sed quia nescitur, quæ damna &c.* because it appeareth not to the Court what the damages were, therefore a writ was awarded to enquire of damages, upon the return whereof executed, the judgment was fully and compleatly to be given of a summe in certain; which second judgment it appears not by the book in what manner it was entred, and therefore might perhaps be then agreeable with the other. And that the said first judgment before damages enquired of, is not a plenary and full judgment; but an award of judgment, hath been divers times resolved, and that therefore any defect and insufficiency in the declaration may be shewed time enough after the first and before the second judgment. Yea,

Tr. 30 Eliz. Pasc. 33 *b.* in comcanc.

if the plaintiff die before the second judgment, though after the first, the action falleth to the ground: So if the defendant die; otherwise, of death after full judgment. But this notwithstanding, and howsoever it there were done upon the second judgment me-thinks it were righter and fitter, that the first judgment should expresse that the damages should be had, and levied out of the testators goods, for whom and in whose right the Executor is sued.

So for rent behind since the testators death, Co. l. 5. lo, 31. the suit is in the debt as for his own debet, M. 14. & 14 El.

Another case there is wherein the judgment must be, as it seems, against the executors own goods, *viz.* in an action of covenant for a breach of covenant since the testators death; for so was it held both by all the Judges of Common Pleas, except the Lord *Dyer*, and by the prothonotaries in the late Queens time, where the case was of an house upon the lease, negligently burned in the executors time, for which damages only were to be recovered. And sometimes where the executor himself is so to bear the burthen, I find the Judgment entred, that the sum recovered shall be levied of the lands and goods of the Executor.

Lib. Intr. 329 a. & b. *De terris & catallis*, &c.

CHAP.

CHAP. XVII.

Of Women covert Executors.

THere being two kind of persons who have some disability upon them, *viz.* *Feme* coverts, or married women, and Infants; touching whom we find in many places question and discepration in our books: we will consider of them by themselves, or apart from others; yet not joyning them together neither, but each by himselfe separately.

First, therefore of *Feme*-coverts; touching whom we will consider these three things:

First. whether they may make Wills and Executors, with or without their husbands assent; and how, whereof, and in what cases.

Secondly, whether they may be made Executors without their Husbands assent, or how their Husbands may hinder it.

Thirdly, what acts in execution of the executorship they may do without their Hus-

husbands, or their husbands without them.

Sect. 11. A woman married, or feme-covert, we know is *Sub potestate viri, cui in vita contradicere non potest*, as saith the writ given by the Law to the wife for recovery of her Land after her husbands death, being alienated by him. Therefore it is that Judges, when a woman is to acknowledge a fine of any Land, do examine her apart from her husband, to know whether she be willing, or come to do it by the compulsion of her husband: It is therefore hard for her to have freedome of will, and consequently freedom to make a Will. Besides, all her moveables or goods personall, which she had at the time of her marriage, otherwise then as executrix or administratrix, are by the Law totally devested out of her, and setled in the husband as fully, *Ipso facto* upon the very marriage, as any other that were his own before: Of these therefore she can make no disposition, no more then of other her husbands goods. But in case she do by Will bequeath them, although the Will and gift be void, yet if the husband, as the case was in the time of *Edward* the second

Sola & secreta examinata.

Debts (except, which are not properly goed.

5 F. 2 *Fitz. devise.* 24.

cond, doe after his wives death consent to this her will and gift, by delivering of the goods bequeathed after her death, or assenting that the legatee take them by vertue of such Will and gift; this amounteth to a new gift by the husband. If a woman have a Lease, an estate by extent, a wardship, the next avoidance of a Church, or other chattel real; these are not devested out of her into her husband by mariage but in case she overlive him, they continue to her as before; no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his life-time, though not by his will; yet such a woman in her husbands life-time could not, of or for these things, without her husbands assent, make an Executor or Will; but she dying before him, they would, by the operation of Law, accrue to him. And here then observe a Case, though not frequent, yet full of mischiefe when it happens: Suppose that a woman indebted a thousand pounds, and having Leases and moveable goods to the value of three thousand or foure thousand pounds, marrieth with *I. S.* and then dieth before the debt be recovered against

gainſt her: in this caſe the husband ſhall have, and goe away with all this value of his wife, and is not in Law lyable to pay one peny of her debts, becauſe he is neither her Executor nor adminiſtrator: What the Chancery could doe, or rather what the Lord Chancellor or Lord Keeper would doe in this caſe, I will not take upon me to ſay or determine. Another ſort or kind of goods, or rather intereſts a woman may have, *viz.* debts or things in action, which as the former are not deveſted out of her by marriage into her husband, nor yet can ſhe thereof make an Executor without her husbands aſſent, although they be one degree farther from the husband, then the ſaid chattels reall; for that though the husband doe ove-live the wife, he ſhall not be intituled to them as to the former: But if his wife make him Executor, as ſhe may, or if after her death he take adminiſtration of her goods, then as he is thereby intitled to them, ſo is he liable alſo to pay her debts out of the ſame, when he ſhall have received them.

During her life he is, but not after.

But the husband may receive the or releaſe them.

32 H. 7 f. 22. The husband was ſued in Spirit. Court as executor to his wife. So ſhe is often to former husband and to father, &c.

Laſtly, *Dato*, that a woman-covert is executrix to ſome other perſon, and in that right hath goods moveable; theſe

are

are not devested out of her, because she hath them not meerly to her own use, but as representing the person of another: But whether then may she without her husbands licence or assent in respect of her being an Executor, and for continuation of this Executorship, make Executors, and consequently a Will or not? Hereabout hath been much diversity of opinion: Some bookes generally speak that the wife may make an Executor, but speak nothing of the husbands assent, whether necessary or not. Else-where we find it mentioned, that if the husband after the wives death countermand (some books false printed, say command) the proving of his wives Will, then it loseth all force, or becometh void, and of no value: but in this case is no mention, in what state this wife stood, *viz.* whether she were Executor or not, no not so much as whether she had any thing in action, or chattel real or not, so as nothing in particularity can be grounded upon that case. But there are expres opinions that the husbands assent is absolutly necessary even in this case, so as without it the wives making an Executor shall be meerly void, and consequently

39 H. 6. f. 27.

34 H. 8. S. Bro. Testaments 22.

18 E. 4. f. 11 Vavasor Jud.

quently, he to whom she was Executor shall now by her death be dead intestate. And of this opinion was *Babington*, chief Justice, in the begining of *Henry* the sixt his time, Yet contrary hereunto was the opinion of *Fineux* chief Justice in the time of King *Henry* the seventh, *viz.* that where the wife is an Executor she may also make a Will and an Executor without any consent or assent of her husband. And to this opinion doth Master *Perkins*, after consideration of the books on both sides, incline. But some will say, that since all this, in the late Queens time this hath been contrarily resolved, *viz.* in the case between *Andrew Ognell* plaintiff, and *Underhill* and *Apleby* defendants; in the end of which Case, it is in expresse termes said to have been then resolved, that a Feme Covert or maried woman, could not make an Executor without the consent of her husband. To this I answer, that this Case is to be construed with relation *Ad materiam subjectam*, viz. to the matter, and point in question, and under consideration; which was that state of a woman whereof we have before spoken, *viz.* one having things in action,

4 H.f. 31.

12 H. 7. 24. b

Tit. devis. f. 27.

Hill 29. Eli. in Com. ba.

Cook. lib. 4. 23. b.

debts

debts or duties to her belonging, as there in particular it was arrerages of rent due to the woman before marriage. As for the point of a woman Executor to another person, it was never in that Case under disceptation, no nor once mentioned in the debate or arguments thereupon. Now considering the very form, and phrase of judgments at the common Law, which are thus, *viz. Idea consideratum est per Curiam, &c.* not *Adjudicatum est*, that is, It is considered by the Court, not in expresse termes, that it is adjudged: This I say well observed (as to me it seemes very remarkable) giues us to know, that no more is adjudged then is considered of, the judgment being contained, and clasped up in the word *Consideratum est*. Wherefore, since in *Ognells* Case, the point of a woman coverts ability in Case where she is an Executor, to make a Will and Executor, hath not been considered of, (the eyes, tongues, nor thoughts of the Judges, being once set upon it,) It cannot be, that that point is there resolved or adjudged. Besides, even in a few words expressing as to me it seems, the reason of that resolution, it appeares

not

not to have been the intent of the Judges, that the ſame ſhould reach or extend to this Caſe, of a woman covert-Executor: for it is added (as the reaſon of the judgment, in my conceiving) that the adminiſtration of the wives goods doth of right belong to the husband, which amounts to this, in my underſtanding, *viz.* that where the wives making of a Will, and conſequently of an Executor, may be prejudiciall to her husband, and prevent him of ſome benefit or advantage, or tend to his loſſe and diſadvantage, there it ſhall not be available or effectuall without his aſſent, and therefore not in the Caſe of her, who having debts or duties to her due, would by making another to be her Executor, exclude or preclude her husband from that benefit, which to him ſhould pertain as adminiſtrator of her goods. Now as for the goods, debts or credit to her as Executor to ſome other pertaining, no benefit could redound to the husband by having ſuch adminiſtration of his wives goods, for thoſe ſhould goe, and be to the next of kinne of the wives Teſtator, taking adminiſtration *De bonis non adminiſtratis* of him, if ſhe have no

Execu-

Executor; and therefore her making Executor, as touching these, brings no hurt or prejudice to her husband, and so is out of the reason of *Ognels* Case. Since then it is so, and since the Law favoureth Wills, and it was by implication, part of his Will who made her Executor, that she should have power to continue his Executorship, by making another to succeed therein, after her decease, for performance of his Will; why should the Law give to the Husband, who can receive no prejudice thereby, power to give impediment thereunto? for, *Frustra est inutilis potentia*, even reason it self frames, and awards against him in this Case, a *Quare impedit*, or rather, a *Non impedit*, as to me it seems. Wherefore to conclude, I take it, that the opinion of *Fineux* is good law in that point of a femme covert Executor, though not in the other point, where she only hath debts, or things in action to her self due; for therein the said resolution in *Ognells* Case, grounded upon good reason, gives me satisfaction to differ from *Fin.* who making no difference between the cases, held the husbands assent needless in both. *Posito* then, that the Wife of *I. S.* having debts due to her self,

and being also Executrix to *I. D.* makes a Will without her Husbands assent, *I. N.* her Executor, and dieth; what shall we now say? shall we say, that as touching the Goods & Credits, or things in action to her as Executrix of *I. D.* pertaining, this Will stands good? and *I. N.* as her Exec. may prove it contrary to her Husbands Will? and that as to the Credits to her self in her own right pertaining, the Will is void, and thereof her Husband may take administration? Shall she die both testate and intestate; with a Will, and without a Will? shall she have both an Executor and administrator? why not, to several purposes, as well as where an Executor is made only for one particular thing, or one place, the testator may elsewhere die intestate? and so where the Executorship is divided, as before is shewed, and one to whom part is committed will prove the Will, but the other to whom other part of the Executorship is committed, will not take it upon him: here must needs be a dying, for part testate, and for part intestate.

As for the second point, *viz.* Wives or Women coverts, being made Executors, and so having the office of Executorship

put

put upon them against their Husbands will, there hath also been diversity of opinions. In the time of K. *Edw.* 1. *Brab.* Justice saith, she may be Executor without her Husband, and the administration shall be delivered to her only. And I think he meant, that this might be without the consent of her Husband, or, whether he would or not; for so it is said in the time of King *Henry* the seventh, to be the Law spiritual: and indeed in Courts spiritual, no difference is made between Women married and unmarried, for ought I can find. There a Wife sueth, and is sued alone without her Husband; he intermedleth not, nor is intermedled withall, touching the things pertaining to his Wife. But at the common Law, it is otherwise; and there, as *Bryan* chief Justice saith, a Wife, without the assent of her Husband, cannot be Executor, he meaning thereby, that the Husband may oppose and hinder it; for such a one may be named Executor in and by a Will, without the knowledg of her Husband: let us then see how after the death of the testator, the husband can hinder her proving the Will, or intermedling to administer, since it may be a matter both of much

13 *Ed.* 1. *Fitz.* Exec. 119.

2 *H.* 7. 15. b.

2 *H.* 7. 15.

trouble and danger to him, to have the Executorſhip faſten upon his Wife, and conſequently upon himſelf. On the other ſide, it may be a benefit and advantage to the husband, and therefore we will alſo conſider, whether the husband may (though his Wife would refuſe) aſſume the executorſhip, and faſten it upon her. The teſtator therefore being dead, & fame or common bruit carrying it to the Ordinary, that the Wife of *I. S.* is made executrix; if ſhe come not in *gratis*, or voluntarily to prove the Will, *Proceſs*, or a citation is to be ſent out of the ſpiritual Court againſt her, to enforce her coming in to take on her the executorſhip. She coming, may clearly, as well as any other perſon (eſpecially, if her husband concur with her therein) refuſe this office, truſt and charge, ſo as if there be no other executor named, the Ordinary muſt commit the adminiſtration: If ſhe ſhould not come and appear, ſhe ſhould be excommunicate, as I take it, notwithſtanding any allegation or intimation by her Husband of his unwillingneſs to have her take upon her the executorſhip. But ſuppoſe ſhe doth come into Court, and offers her ſelf ready to take the Executor-

ſhip

ſhip upon her; and on the other ſide, her husband expreſſeth his diſ-aſſent thereunto, praying, that ſhe may not have the execution of the Will to her committed: what will then be done? This, I confeſs, pertains to another learning, and not to that of our profeſſion: but foraſmuch as I find, that in the Courts Spiritual, a Wife ſtands in the ſame plight and ſtate as a Woman ſole, the husband not intermedled withall, in the affairs of the Wife; therefore do I conceive, that in that Court, the husbands refuſal will not be of force to hinder the committing of the executorſhip, to the Wife not refuſing; at leaſt, if there come not a prohibition to ſtay the Spiritual Courts ſuch proceeding; but whether a prohibition be in ſuch a Caſe to be granted or not, as I find no reſolution in my Books, ſo will I not take upon me to reſolve. This ſtands clear in the rules of the Law of *Eng.* that the Wife is under the Husb. power, and cannot contradict him in pleading, & doing other acts, even touching her own Freehold: nay, ſhe cannot take lands nor goods by gift or Conveyance, without her husbands aſſent, as the Law hath been, & for ought I know, is taken. But if once the

33 *H.*6.31. 43, 39 *Ed.* 3. 1.

27 *H.*8.24.

Will be proved, and the execution thereof committed to the Wife though against her Husbands mind & consent, I think it will stand firm; and the Husband and Wife being after sued, cannot say, that she was never Executrix: and I doubt, whether the Wife administring without the Husbands privity and assent, although the Will be not proved, do not conclude her husband as well as her self, from saying after in any suit against them, that she nei her was Executor, nor did ever administer as Executor. Yet perhaps this administration by the Wife against her husbands mind will (as against him) be as a void act, else cannot I see how *Brians* opinion before cited, *viz.* that the wife shall not be an Executor, without, or against her husbands mind, can be Law. On the other side, if the husband of a Woman, named Executor, would have his wife to take upon her the execution of the Will, and to prove the same, but she will not assent thereunto (wishing perhaps, that gain and benefit, rather to some of her kindred by a way of administration, then to her own husband by her Executorship, as sometimes, Wives accord not well with their husbands) in this Case, I think

11 *H.* 6. 4. The Plea is, that the Femme did, or did not administer, without speaking of the husband.

33 *H.* 6. 31. The husband may administer, and prove the Will for his Wife.

think the Court ſpiritual will not faſten the executorſhip upon the Wife againſt her will. But *dato*, that the Husband, though the Will be not proved, doth adminiſter as in the Wives right, but againſt her mind and will, ſhall ſhe be now hereby bound & concluded, ſo as after ſhe cannot decline, or avoid the executorſhip? and ſurely I think, that during her Husbands life, ſhe ſtands concluded at the common Law, for that there ſhe ſhall not be, nor can be ſued alone as Exec: & then being ſued with him, ſhe muſt joyn in plea with him, *viz.* that ſhe neither was Exec. nor adminiſtred as Exec: and then this act of her husbands given in evidence will, as I take it, cauſe that the Verdict be found againſt her: not ſo after her Husbands death: then ſhe may refuſe as the L. *Dyer* ſaith, and citeth, as reſolved. These things I thought good to offer to conſideration, and ſo leave them without reſolution. Difference perhaps may be, where a Woman ſo made executor taketh an husband after the teſtators death, before either proving, or refuſing to prove the Will, and where ſhe is made Exec: during the coverture, as there in caſe of a diſcent of her land, to the heir of a diſſei-

1 *Eliz. Dyer* 166. b. there is cited 3 *H.rot.* 112. *Nota per B H.*

for; for when there is upon her such a state of election, she marrying before her resolution or determination, doth upon the matter, deliver it into the Husbands hands: not so where it first findeth, and falleth upon her in the state of coverture: if the Husband were indebted to the Testator, this making of the Wife Executor, is, as I take it, a Release in Law, as well as if she were the debtor, but if, after the testators death, she do marry such a debtor, it is a devastation.

The third Point.

Touching the administration or execution of the Office of an Executor, by a Femme covert, and her Husband.

WE will now come to admit the execution of the Will assumed by concurrent consent of husband and wife, and the Will proved with both their likings in the wives name; and examine what acts the wife of her self is able to do, and what her husband without her.

It hath been conceived by many of old, and by some of late, that if a Femme covert, or married woman executrix, release a debt of her Testator, or give away the goods which she hath as Executor, or deliver a legacy bequeathed, it was firm and good;

good; and on the other ſide, that her husbands gift or Releaſe was of no value, for that the adminiſtration, or execution of the Will is committed to the Wife only, and ſome have gone ſo far, as to ſay, that ſhe may ſue, or be ſued without her husband (in the Courts of Common Law, I mean) for in the Spiritual Court it is true, the Husb. is not joyned with the Wife in ſuit;) but the Law is doubtleſs in all thoſe points contrary, as not only ſome opinion alſo was of old, *viz.* in the time of *H.* 7. but alſo hath been in the late Qu. time reſolved: for otherwiſe, if the Wives gift, or Releaſe, ſhould ſtand good, her act might exceedingly endamage her Husb. and make his goods liable to the Creditors, the teſtators ſtate being waſted by the gifts or Releaſes of his wife. Wherefore it was held in the ſaid late Caſe, that unleſs due payment were made to ſuch women covert Executors, their Releaſes or Acquittances be void; and ſo alſo their gifts & grants: yea, it was then held, that the Husb. of the wife executrix, may give goods, or make Releaſes of debts at his pleaſure. But doubtles by mariage, neither are the goods (though perſonal) which the wife hath as Exec: deveſted out of her, and

See 18 *H.* 6. 4. In debt the Plea ſhall be, that ſhe hath fully adminiſtred; and reply, that ſhe hath aſſets, never mentioning the Husband.

33 *H.* 6. 31.

and ſetled in her Husband as her own goods are; not if ſhe die, ſhall they accrue to the husband, if no alteration were of the property, but ſhall go to her Executor, or to the next of kinne, being Adminiſtrator of her teſtator, if ſhe have no Executor; and ſo was it held in the firſt year of Queen *Mary*: Yea, though for any other Goods which the Wife had in her own right before marrying, the Husband alone, without naming the Wife, may maintain an Action of Treſpaſs; yet touching ſuch Goods, as the Wife hath as Executor, the action muſt be brought in the names of the husband and Wife, to the end, that the damages thereby recovered, may accrue to her as Executor in lieu of the goods. So alſo muſt the Replevin for thoſe goods be in both their names. But although the Husband be thus named with the Wife, yet principally, is it the ſuit of the wife and therefore in ſuch actions, or in debt by Husband and Wife, ſhe being Executor, if it come to tryal by Jury, the huſband being an Alien, yet ſhall he not have trial, *per medietatem linguæ*, or *alienigenarum*, that is, by half Aliens, as in other Caſes, where an Alien is party to a ſuit,

M. 31 *El. in Com.* b. If the Husband be to avow, it muſt be in the right of his Wife, Executor, or Adminiſtrator, *Manfields* Caſe. Doctor *Fuller* his caſe.

Suit, is to be had. And where to a Wife made Executor, power is given to ſell Land of the Teſtators; ſhe may ſell to her own Husband, as was reſolved in the time of K. *Henry* the 7th, where the Feoffees (it being Land ſetled in uſe) were committed to the Fleet, for that they would not execute an eſtate to the husband, according to the Wives ſtate. But of this I much marvel, ſince the Law intends the Wife ſo under the husbands command and ſubjection, that it holds not her diſpoſition of Land to him by Will free, nor therefore of force, and how ſhall this then be conceived to be but a partial ſale; yet *volenti non fit injuria*, and he that will put ſuch power into the hands of a Woman under coverture, doth in a manner, ſubject it voluntarily to the husbands will. And it hath been held by ſome, that even an Infants, or feme coverts conveyance in ſuch Caſe of neceſſity, ſhould ſtand firm and unavoidable, becauſe of the condition expreſs or implied, that the ſtate ſhould be void, if no ſuch Conveyance made.

10 *H.* 7. 20.

Bro. Juſt. *Cui in vita*, 15. She may ſell to any other, but not to him.

Fenner Juſt. in *ba. reg. Paſc.* 37. *El.* & 34 *E.* 3. *Ere. Cui in vita* 15. No prejudice to them, that it be good.

Touching

CHAP. XVIII.

Touching Infants, and their making, or being made Executors.

BEing now to consider of disability by age, for want of years in persons making, or being made Executors: Let us first take view of the several ages of men and women, to several purposes material in the Law, judgement, and respect. And first, touching a Woman:

1. 35 H.6.41.b *Wangford* in *Henry* the sixth his time shewes, and other Books approve, that she hath six several ages, respected in, and by the Law. As first, the age of 7. years, for her Father to have aid of his Tenants to marry her. Next, nine years, to deserve

2. dower, that is, that in case she be of that age, at the time of her Husbands death, she shall be endowed; but not if she be any thing under those years; the Law being Physically informed, that a Woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the

18 *Eliz.* c.7. Parl: in the late Qu. time, when it was made Felony, to have unlawful carnall knowledg of any woman child under the age of ten years, it being then conceived,

as I think, that no ſuch could conſent.
The age of 12 years, is a womans time 3.
for aſſenting, or diſaſſenting, to marriage
in more tender years had. For ſo it ap-
peares by divers Books, although Mr.
Littleton have here no diſtinction between
male and female. The age of 14 years is 4.
a womans time to be in wardſhip, or not;
ſo as if ſhe be any thing above thoſe years,
at the time of her Anceſtors death, ſhe
eſcapeth wardſhip. The age of ſixteen
years is her time of coming out of ward- 5.
ſhip, being once fallen under it; for al-
though, had ſhe been full fourteen, ſhe
had eſcaped it; yet not ſo being at the
time of her Anceſtors death, her ward-
ſhip laſteth till ſixteen years, except the
Lord ſhall ſooner marry her. And laſtly, 6.
the full age of a woman, whereby ſhe is
inabled firmly, and unavoidably to make
grants or Conveyances, is 21 years, as
well as for the male; before which time,
be it that ſhe being ſole, make a feoff-
ment, or other Conveyance, or being mar-
ried, alien her Land by Fine, and her
Husband of full age joyn with her, yet is
it infirm, and avoidable.

Now of the male, or man, the firſt 1.
age material, and ſetledly reſolved on,
is

is twelve years; for at that time, each male is at the Leet, to swear his fidelity to the King; this, Women do not, and therefore are they never said to be outlawed, but to be waived, because they have not this admittance into the Law which males have. This hath been, as I think, the ground of that speech, That Women are lawless Creatures.

2. The second age of Males is 14 years, accounted by the Law, the age of discretion, especially material to two purposes, *viz.* First, that if one under that age, commit an act amounting to Felony, yet is he to stand free from the attainder, and punishment incident to a Felon: Regularly it is thus; but, *non est regula quin fall.* One of much lesse years having attainted ripeness of discretion, and discerning, shall incur the like attainder, as one of full age: as was resolved in
3 H.7.f 1.6. the time of King *Henry* the seventh, touching an Infant but of the age of nine years, who having killed another Boy of the like Age, with his knife, and then hiding the slain Boy, and excusing the blood found upon him, by saying, That his nose had bled: It was held by the Judges, that he was to be hanged as a Felon,

Felon, his ſuch non-age notwithſtanding. The other point, touching which this age of fourteen years, is eſpecially material, is touching an Heir of Lands, held by Socage; for in caſe ſuch Heir be under that age, he is to be in ward to the next kin; but if he be of that age, he is not to be in ward at all, for that the Law judgeth him to be of diſcretion at thoſe years, and therefore a Guardian in Socage, being in effect but a Bayliff accountable, he hath no need of ſuch an one, other than ſuch as himſelf ſhall chuſe.

The third Age in and touching males material, is fifteen years; for every Lord of a Mannor, or one having Freeholders in Socage, or by Knights Service, when his eldeſt Son cometh to that age, *viz.* fifteen years, is to have of them ayd for the making of him a Knight; towards which, every one holding by a whole Knights Fee, is to pay twenty ſhillings, and ſo ratably for more, more; and leſſe, leſſe: and each holding twenty pound Land in Socage, is to pay the like ſumme, and ſo ratably, for more or leſſe. 3.

The fourth Age of Males, is the full age 4.

age of 21 years, which maketh him free from wardship, having Lands held by Knights service descended unto him: And also makes him able to alien Lands or goods, makes firm his Bonds, Statutes, Recognizances, &c. for although at fourteen, the Law judge him of discretion, yet doth it not hold him fully ripe, till one and twenty.

5. *Oblitum.* Another of 60. to exempt from being compelled to serve by the stat. of labourers. 23 E. 3. c. 1. W. 2. cap. 38. 13 E. 1. no. Na. Br. 165.

The last age of males, respected by the Law, is seventy years: at which time, Sheriffs are to forbear to impanel them in Juries; and in case they do not, such old man may have a Writ to the Sheriff, grounded upon the Statute for that purpose, made in the time of K. *Ed.* 1. commanding such Sheriff to forbear the impanelling of him; and he may have an action to recover damages upon that Statute: This is called by most, *a Writ of Dotage*; a word, perhaps, anciently taken in a good and favourable sense, *Pro dote ætatis*, *viz.* a gift, priviledg, or exemption allowed to age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction, taken view of these several ages, let us now see wherein, and how age is material, touching them who are to make, or to be made

made Executors, and what age is required thereabout. Master *Perkins* ſaith, that one of four years old, may make a Will, and conſequently Executors; and his reaſon is, becauſe the Executors being to account before the Ordinary, it cannot be intended, but that the goods ſhall be diſtributed for the good of his Soul: He ſpeaks as if he only made an Executor by his Will, but did not bequeath any thing, but left all to the Executors conſcience and diſcre ion, which is not uſual, though feaſible, as before I have ſhewed, or ſaid at leaſt. But admit it were ſo, and no requeſt at all contained in the Will; yet ſince at that age, an Infant hath no diſcretion to elect a fit perſon to diſtribute his goods, money, and other things; no nor to make continuation of an Executorſhip to another, to whom, perhaps the Infant was Executor: I cannot ſee, that his Will ſhould be of any force; but if he be of the age of 14 years, being the age of diſcretion, in the judgment of Law, then I ſhould hold him able to make a Will, although yet he be an Infant till 21 years, and can make no gift of Land, nor goods, which ſhall be of force. And *Babington*, Chief Juſtice, to other purpoſe, makes like

Deviſes. f 97. No good reaſon, for one may make an ill account, ſpecially having a childs direction for his doings.

9 H. 6. f. 6.

like diſtinction between an Infant of ſuch tender years, and one come to the years of diſcretion. So alſo as before we ſhewed, is it in the caſe of Felony. And that way alſo ſounds that which *Hanck* ſayes in *Henry* the fourth his time, *viz.* that an Infant of 18 years old, may be a diſſeiſor; as implying that his years may be ſo tender, that as *Candiſh* ſaith of an Infant in *Edward* the third his time, he is not to be intended able to know or diſcern between good and evil: me-thinks therefore he ſhould be at the leaſt, of the age of diſcretion, *viz.* 14 years, who ſhould be able to make a Will, and conſequently an Executor. And the Cuſtom for an Infant of fifteen years old to bequeath by Will, hath, as to me it ſeems, affinity with this opinion, though there the Caſe was of Land in a Borough, deviſable by Cuſtom; and that way reflecteth the Caſe in the time of King *Henry* the ſixth, where it was ſaid, that an Infant under fifteen years of age, ſhould not wage his Law, *viz.* take an oath to acquit himſelf of a debt, or excuſe his default in an action real. And further reaſon of this opinion will ariſe out of the conſideration of an Infant made an Executor.

2 *H.* 4. 22.

40 *Ed.* 3. 44.

37 *H.* 6. 5.

11 *H.* 6. f. 40. 6.

Now

Now touching an Infant made Executor, how young ſoever he be, the making of him ſo is not void, but yet the execution of the Will, which is the performance of the office of Executor, ſhall not be committed to him, till he come to the age of ſeventeen years, by the Law Spiritual, and till then (for that he is not able to do the part of an Executor,) Adminiſtration is to be committed to ſome other; yet if it be a Woman Infant, who is ſo made Executrix, in caſe ſhe be married to a man of ſeventeen years old or more: now is it as if ſhe were of that age, and her Husband ſhall have the execution of the Will, and if adminiſtration were before committed during the minority of the Woman, it ſhall now ceaſe, as is ſaid in *Princes* Caſe. Yet I do a little marvel at theſe opinions, conſidering that theſe things are managed in the Spiritual Court, and by that Law; and it intermedles not with the Husband, in the Wives Caſe; now by that Law, and not our common Law, comes in this limit of 17. years. And I have ſeen it otherwiſe reported in and touching the laſt point.

Co. lib. 5. fo. 29. p.

M. 41, & 42 Eliz.

Further touching Infants Executors,

Co. l. 5. f. 29. But payment is to be made to the Executor, and not to the Administrator, M. 15o & 16 El. in Com. B. rep. 67. Co. li. 5. fol. 29.

and under the age of seventeen years, this is to be noted, viz. that such an one is not able as an Executor, to assent to a Legacy; so as it may by vertue thereof, settle in the Legatee. Also if Administration be, during such Minority, committed with special words of restraint or limitation, viz. that it is done to the use, or profit of the Infant Executor, then no sale of Lease, or Goods, or assent to Legacy by such Administrator, will bind, or prejudice the Infant Executor; but otherwise, perhaps, if the administration during the minority, be committed generally; and if the testator himself, making an Infant Exec: doth also appoint another to be his Exec: during his nonage, expressing it to be onely for the benefit and behoof of the Infant Executor, I doubt, whether this temporary Executor stand any whit restrained from what pertains to the power of an absolute Executor; for there may be perhaps, difference between him to whom the owner of the Goods commits the government of them, though but for a time, and in special manner; and an Administrator so specially made by the Ordinary, another being presently by the will of the owner, or Testator, to

Co. lib. 6. fol. 671.

have

have the Administration, in whom, for a time, legall defect is found. But now let us passe over this age of seventeen, and consider of the Infant between that time of his being admitted to take upon him the Executorship, and his accomplishment of his full age of one and twenty. First then, suppose that he doth release a debt due to his testator, whether shall this be good to bind him, and to discharge the debtor, as well as if the executor had been of full age, he now having proved the Will, and being by the Law Spirituall, approved an able Executor? And this point coming in question in *Russels* case, in the late Queens time, consideration was had both of divers good Reasons, for enabling of this Release, as that an Executor represents the person of his Testator, and in his right and power, doth these acts, and not in his own, and therefore his Infancy, which is a state or condition of his own natural person, shall no more disable him, than it doth the King, a Maior, or other Head of a Corporation. Also divers Books were found to run that way, as well in the case of an Infant, as of a Femme Covert. But upon great deliberation in the Kings Bench, and

H. 26 Eliz.

16 H. 6. Re. 45. 21. E. 13. 24.

upon conference had with the Lord *Anderson*, *Manwood*, and other Juſtices, it was reſolved and adjudged, that the Releaſe of an Infant Executor, without payment of the debt and duty, would not bind or bar him. 1. For that if it ſhould, it would be a waſting, or devaſting of the goods of his teſtator, and ſo would charge his own goods. 2. It would be a wrong, which an Infant could not do by his releaſe. 3. It was no purſuit nor performance of the office or duty of an Exec. but the contrary. And upon this Judgment, a Writ of Error was brought in the Exchequer Chamber, where it was agreed by all, that the Releaſe was not effectual nor binding, ſo as this point now had the reſolution of all the Judges of *England*. But it was agreed, that if payment or ſatisfaction had been made, then the Infant Exec. might have made a good acquittance and diſcharge, and indeed, payment it ſelf, if proved, brings diſcharge enough, except in the caſe of a ſingle Bill; Note, that the principal caſe adjudged, was not a releaſe of any debt or duty by ſpecialty, but of treſpaſs in converſion of goods found or taken in the Teſtators life-time. But *Poſito*, that this

Co. lib. 5. fol. 27.

Infant

Infant had assented to a Legacy, whether will this bind him or not? for in the case of *Russel*, it is said, that all things which an Infant doth, according to the office and duty of an Executor, will stand firm; now it is part of his office, to pay and execute Legacies. Yet since this act amounts to a vastation, or wasting of the Testators goods, as well as the other, in case there remain not goods sufficient for payment of the debts; and consequently here, as well as in the other Case, the Infants own goods would become lyable to his Testators debts; I doubt, and incline, that it is not, nor can stand effectual; for except in the other, we admit a want, or possibility of want of assets or goods, the release could neither hurt the infant himself, nor do wrong to any other; and that admitted, this case is of like prejudice; yet if these assets should be voyd, so also would be his payment of Legacies, and how then were he an able Executor, at the age of seventeen years, to sue, and to be sued for debts, and Legacies, and if upon Suit, it cannot be shewed, that debts will take up all, or disable the payment, then haply, he may be forced to pay; Quære, notwithstanding, whether

these acts (though voluntary) stand not good upon *Bene esse*, or conditionally, *viz.* if there be besides goods sufficient, *&c.* or that else the nonaged Exec: may have an action of accompt for the money by him payd to the Legatee, and also avoid his assent, where that only needful. But doubtless, neither the assent of such Executor before his age of 17, nor any payment of a debt to him could be good, although such acts to, or by another Exec: before the proving of the Will would stand firm and good; for this Infant wants not only proving, but also ability to prove his Testators Will, yea, the will stands suspended, and the Testator as it were intestate, whilst the administration stands in force, so as during that time, nothing can be done by any as Exec: & therefore there is great difference between the Cases. What if payment of a Legacy be made to an Infant, can he make a sufficient acquittance? this I confess, is besides the point in hand, yet because it concerns Infants & Executors (though not infant-executors) it is not amiss here to cast some thoughts, & words upon the point; for that it many times perplexeth both Exec: & Legatees. First therefore, in case the Infant be of the years of discretion, *viz.* 14. I hold it clear,

clear, that any payment to him made, will ſtand good, for that the Law at that age, holds him able to govern, and manage his own Lands held in Socage; and conſequently, to receive the Rents thereof: wherefore, whether he, who makes ſuch payment, have any acquittance, or not; if he have proof of the payment, he is well enough acquited from any ſecond payment; and if without payment, he get an acquittance, it will not ſuffice, the Infancy of him who makes the acquittance conſidered. Beſides, if the acquittance be, as moſt uſually they are, but ſigned only with the name of the maker, and not ſealed, it is only an evidence or proof of payment, and no pleadable acquittance, becauſe no deed, ſo as it nothing differs from proof by Witneſſes, ſave that it is not mortal as they. But now if the Infant be under the years of diſcretion, what ſhall we ſay to a payment to him ſpecially, if he be but 3. or 4. years old, or thereabout? here I think caution is to be uſed by the Exec: generally, and the ſureſt way is, if he fear to keep it in any reſpects, to pay it into the Court, where it is recoverable, *viz.* where the Will was proved; yet the Caſe ſo may be, as that this may

Notes of Receipts called Acquittances.

payment may not be at all safe for the Executor. As put the case, that he entred into Bond or Statute, to pay all Legacies by such a day, to the several Legatees, here I think the payment into the Court Spiritual sufficeth not, for that must make the receit to be, with some charge, which is in some kind an abatement; there I think therefore legally to secure the Executor, the payment must be to, or in the presence of the Guardian, because of no riture, *viz.* him, or her who hath (though not as guardian, in respect of Lands) the custody or education of the Infant: for otherwise, to pay it into the hands of such a tender Infant, separate from any governour or guardian, ware to expose it to losse, both for that he is not able to count the sum, and for that he yet not being come to discerning years, were like with *Æsops* Cock, to part with Pearls, or Coin for plums and trifles of no value. But in case no Bond, nor other collateral penalty lie upon the Executor, or in case the Bond or Statute be, only to perform the Will generally, which nothing alter the course of payment, which by the Will the Law laies upon Executors, then is not the Execut. put to any such payment,

Quare.

nor

nor need pay without demand, and acquittance, as in case of payment, upon a single Bill, or of rent seck where no distress can be taken, nor other penalty incurred: yet in that case if demand be, and acquittance ready to be given, let the Executor take heed, in case he be bound to performance, that he stand not upon the invalidity of the acquittance in respect of nonage; for as I have said, proof by witnesses may supply a nullity of acquittance, and much more, the weakness or imbecility; payment according to the testators appointment, being the matter which acquitteth the payer, and this the Exec. may have testified under the hands of divers witnesses expressing circumstances, so as all dying, he may continue safely from second payment, as well as if an acquittance had, the witnesses whereunto are subject to mortality, as well as the other. But herein Courts of equity do often interpose helpfully for them, who seek not evasion from payment, but only security in paying. And of infant Executors, and by occasion thereof, of infancy in Legators or Legatees, thus much.

CHAP.

CHAP. XIX.

Of Legacies.

ALthough these be not recoverable at, and by the Common Law, but most naturally at, and by the Law Ecclesiastical, yet by Suits in Courts of Equity, as the Chancery and Court of Requests, they are often obtained, and of many things touching them, the Common Law taketh notice, and hath manifold occasions so to do: we will therefore consider thereabout, these parts or points, some whereof, have been in part before touched upon other occasions.

Whether any Legacy in certain, and lying in prender, may be taken, or had, without the Executors assent, by the Legatee, or him to whom it is bequeathed?

When an Exec: can, or safely may pay, deliver, or assent to a Legacy?

Whether one Exec: alone may do it, and what if the Executor be an Infant, or Woman covert?

What shall amount to an assent of the Execu-

Executor, and what to a diſaſſent, or diſablement of aſſent?

How a Leaſe or Chattel real, may be given to one for a time, with remainder to another, how not? 5

Where an aſſent to the firſt, or one part of the bequeſt, ſhall imply or amount to an aſſent for the reſidue. 6

Of the manner of aſſents, and therein of aſſents conditional. 7

What manner of Intereſt he in the remainder of a Leaſe, after the death of another, hath during the life of that other, and whether he may diſpoſe of it, during that time, and how? 8

Whether this remainder can be defeated by any act of the deviſee for life, or by the death of him in remainder firſt. 9

By what acts or accidents, a Legacy may be forfeited or loſt, and therein of revocation, death before, *&c.* 10

Whether the executors aſſent ſhall have relation to the Teſtators death, and ſhall make good a grant before made by the Legatee. 11

If the Exec: give it to another, the Legatee hath no remedy at the Common Law, *per Priſot.* 37 *H.* 6 30.

As for the firſt, we have before ſhewed the aſſent of the Executor to be neceſſary before any Legacy can be had, for that debts are firſt to be payd, & that the Exec.

is to look to at his peril. But hereto add a little out of M. *Swinborne*, a learned Civilian, who saith, that in case any goods be in the hands or custody of *I. S.* and the owner doth bequeath them to him, then may he keep or retain them against the will of the Executor, so as there be other sufficient goods in the hands of the Executor for payment of all debts; but though this (as it seems) would it stand in the Ecclesiastical Law, yet for that no property is transferred to the Legatee, without the Executors assent, therefore doubtless, the Exec. may at the Common Law, recover the thing with-held, or damages to the value against the Legatee detaining it. Another Case there is, wherein is the learned Civilian saith, the Legatee may take the thing to him bequeathed, lying in prender, *viz.* Horse, other beast, or piece of Plate, or other like thing known, and in being, and that is where the testator doth expresly so appoint by his will. But herein doubtless, the common Law, at and by which debts are recoverable against Executors, will oppose the Law Spiritual; for else by such appointment, the testator might cause all his goods to be taken by Legatees, and that

none

none ſhould remain to pay debts. Yet if there be other goods beſides ſufficient for payment of debts; then indeed I ſee not how the Executor can hinder ſuch taking without violating his Oath taken for performance of the Will. If any ſay, that it is alſo a breach of oath in the other caſe, I ſay, he obſerveth not that there, that clauſe in the Will being againſt the Law, is void, and conſequently, there is a nullity upon it; and it is, as if no ſuch thing were in the Will, and ſo the Oath extends not to it. And as a Chattel ſhall not be transferred to a ſtranger, without the Executors aſſent; ſo if the Deviſee be to the Executor himſelf, till he elect to take a Legatee, it ſhall be to him as Executor, as appeares by the ſtrain and Argument of two Caſes in *Plowd.* Comment. and more lately in the Kings Bench, the point being divers dayes argued, was at laſt ſo reſolved by three Judges againſt one; and the reaſon of *Cook* at the Barre was very good, for here the Executor ſuſtains two perſons, *viz.* an Executor, and Legatee, and ſo all one, as where the bequeſt is to another; for *Quando duo jura concurrant in una perſona, æquum eſt ut ſi eſſent in diverſis.*

Welchden & Elkington, Paramour & Yardley, Portman & Simmes caſe. *Trin.* 37 *El.* All but *Cawdy* ſo agreed.

As

As for the second point, it may have these two parts: First, when the Executor is able to give such assent to a Legacy. And secondly, when he may do it with safety. As for the first, he is able before *probat* of the Will, to assent unto the Execution of a Legacy, as elsewhere is shewed, and that although he be not of full age of one and twenty years: but if he be under seventeen years, so as he is not able to take upon him the office of an Executor; and therefore administration is during that time, to be committed to some other: Here his assent is not of force, or effectual, as we find in *Prince's* Case, to have been held in the Case of *Piget* and *Custome*. As for the second part, till all debts be payd, the Executor may not safely consent to put the Legatee into the Lease or Chattel devised, no more than he may pay money bequeathed, if there be not sufficient also to pay all debts. Of these things, more is said elsewhere. Yet because the Reader, or he that desires direction in these points, will look for them under this title, I thought not good here, to be altogether silent touching them.

21 El. Dyer, 367.

Co. li. 5. f. 29.

As for the third point, *viz.* Whether the

the assent of one Executor, where there be many, be sufficient, I see not how to doubt, since any one Executor may give away any goods of the Testators, or release any debts due to him, therefore much more assent, which is no more or greater work in effect than an attornment of one lessee upon a grant of a reversion. And if there want to pay debts he only who assented shall answer for it of his own goods, and not his companions. But if this Executor be either under the age of seventeen years, or under coverture, *viz.* a Woman married, such is not able to give a good assent to bind the others; no nor themselves, for then thereby the Infant might draw a debt upon himself, and the wife upon her husband, by assenting to or paying of a legacy, there not being sufficient goods to pay all debts. But the husbands assent is sufficient where the wife is Executor; for his act whom she hath chosen to be her head, may prejudice as well her as himself; yea though she were within age, yet he being of full age, his assent will stand good. But if he or another Executor in his own right be above 17. years of age or under 21. I doubt whether now his

6 H. 5. If the bequest be to one of the Executors, he may take it without assent of his companions; yet, if a debt, his companion may release it. 48. 4. 14. 15. So held where but one of the executors during nonage assented, in the case of Rhetorick and Chapel. H. 9. Jcob. Rot. 875. in Bl. Reg. C.

his assent will be sufficient, at least excepting the case be put, that there be assets sufficient, which perhaps there may be material, though not in the other. See more hereof, after in the title of Women covert, and Infants Executors.

As to the fourth point; first there may be an assent and election implyed as well as expresse: for if in the devise or bequest the legatee be appointed to do some act as in respect of the legacy, and the Executor doth accept the performance thereof, this amounteth to an Assent. So, if the devise be to an Executor for the education of some children which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as Executor, as appeares by the case of *Paramour* and *Yardly*, *Plowd.* 543. So if an horse be bequeathed, and one offering to buy him of the Executor himself, he directeth him to goe and buy the horse of the legatee; or if the Executor himself offer money to the legatee for the horse, this implyeth an assent that it should be the legatees by the Wil, and so was it held in the case between *Low* and *Carter*, where the devisee of a terme did grant it to the Executor

See Co. lib. Int. 150. the executor being deviseé for life, held, the object should have it after her death, and he entred & took admin. the dying intestate, yet held Assets in him. This M. 19. H. 7. Rot. 318. See 1. Int. 321 One gave the third part of his goods to A with whom the executor accounted for the amount, and A. sued for that sum in debt, but no judgment upon demurrer. 11. 37. H. in ba. reg. Where bequests to the Executor himself.

cutor, and this acceptance of a grant from him was held to imply the Executors assent that it should be his to grant. But I see not well, how that should be Law, which in the latter part of the L. *Dyer* is found, *viz.* Where a term was devised to *I. S.* and he was made Executor, and after the death of the Testator, entered and occupied the Lands a whole year without proving the will, that this was an election to have it as devisee and not as Executor. For first, he had good right to the term as Executor befor probate, and so might clearly in that right have taken the profits, although it had not been devised or bequeathed to him, and that before any Will proved. Secondly, he could not by right have it as legatee without assent of himself or some other as Executor. Therefore this general acceptation can determine no election, as elsewhere is held. As for dis-assent or disablement to assent: As if the executor do once declare his assent that the legatee shall have his legacy, he may then enter into it or take it, notwithstanding the Executors countermand or revocation of his assent after. So on the other side, I think, if he fully and expressely deny that the legacy shall take effect,

Tr. 37. Eliz. If he by will bequeath it to *I. S.* this is an elect on to have it as legatee.]

he cannot after make a good assent thereunto, for that election once made must stand peremptory, be it refusal to assent, or assent. Yet *quere* of this, for that the refusal to assent may be checked by sentence or decree, in the Spirituall Court, or Court of Equity, and so an assent be inforced. But if the power of assenting be legally lost by the means aforesaid *viz.* disabled, I see not how any legall interest can be transferred by that compelled assent, howsoever decreed And what is said of a legacy bequeathed to another, the same may be understood in case where the bequest is to the Executor himself, and he makes his election to have it as Legatee, or as Executor. But if where an Horse is bequeathed to *A.* the Executor after the Testators death doth ride the Horse or use him in the Coach, or in the Plough, I doe not take this to be any such disagreement to the Execution of the legacy, as that the Executor cannot after assent to the Legatees having thereof, no more (though it be somwhat more) than where a drinking-cup is bequeathed, and the Executor after the Testators death doth use it to drink in: nay, if a lease of land be bequeathed to *A.* and

So if the executor take a new lease, his assent after is void. Tr. 37 Eliz. Carters case. 19. Eli. D. 359.

nd the Executor continueth the depasturing of the Teſtators cattel therein; yet is not this any diſagreement to the execution of the legacy: But if this le aſeland were let uot by the Teſtator from year to year, and the Executor diſchargeth the tenant, and taketh it into his hands at the years end, this I conceive to be a diſ-aſſent to the legacy, and ſo alſo perhaps may his taking or diſtraining for any rent thereupon due after the Teſtators death; yet am I not reſolute, that the diſaſſent is ſo peremptory and unchangeable, as the aſſent, remembring the Caſe in K. *Henry* the eighth his time, Where a term being granted by a leſſee conditioually, ſo as the aſſent of the leſſor could be had by ſuch a day, though the leſſors aſſent were at one time denied, yet might it be yielded at another, ſo as it were at any time before the day: But yet there it was held, that if no time of aſſent were limited, then one expreſſe denial or refuſall would be peremptory, ſo as the refuſal were expreſſed to the party to whom the aſſent was to be given; otherwiſe, if it were but in ſpeech to or amongſt ſtrangers. This and the former caſe, 19 *Eli.* give the beſt light to this point, that

141.

Dy. 359. After choice once made, no variation.

I remember. Now for disablement to assent, it was held in the forementioned case of *Low* and *Carter*, that where a term is bequeathed to A. and after the Testators death the Executor takes a new lease of the same land for more years in possession, or to begin presently; now by this was the term left by the Testator surrendered and drowned, so as it could not passe to A. by the Executors assent after.

As to the fifth point, *viz.* in what manner a lease for years or other chattel real may be bequeathed to one for a time, with ramainder to another; it hath been heretofore much doubted, when a lease for years was bequeathed to one for life, or for so many years as he should live, whether the limiting of a remainder thereof after his decease were of any validity in Law or not. And this doubt had this ground; any state for life in the judgment of Law is greater than any term for years: therefore when a termer hath by his Will given his term or his house or land, which he so holdeth for years to one for life, or for so many years as he shall live; this Testator and devisor hath not in the judgment of the

the Law any eſtate remaining in him; and therefore it was thought very hard for him to give or limit a remainder to another: But after many arguings and debatings, it was in the late Queens time reſolved, that ſuch a remainder was good, and that if the firſt Deviſee died before the term expired, that then he to whom the remainder was limited, might enter and injoy the reſidue of the term: As for the giving of part of the years to one, and the reſidue to the other; *viz.* If the term being twenty yeers, the Leſſee bequeathed ten thereof to his wife, and the remainder to his daughter; Of this no doubt ever was, but that it was good; for that after the firſt ſtate limited, there remained a further term, *viz.* ten years more in the deviſor, whereof he had power to diſpoſe; whereas in the other Caſe, after the terme limited to one for life, there remained but a poſſibility that this life ſhould not take up the whole term. But now, put we the caſe a third way, *viz.* that the termor deviſeth or bequeathe h the thing in leaſe to one child in taile, with remainder to another, and dyeth, and the firſt entreth and dyeth without iſſue; now Plow. Com. 520. & 542.

whether ſhall the next in remainder, or the Executor of him ſo dying, have the term reſidue? And this caſe came in queſtion and was adjudged about the middle of King *John* his reign, in the Exchequer: for there, Maſter *Hamond* holding by leaſe for years from the Crowne, the Mannor of Akers in Kent, deviſed the ſame by his will to *Alexander Hamond*, his eldeſt Son, and the heirs males of his body, with remainder to *Ralfe Hamond*, another Son, in like manner, and the like remainder to *Thomas Hamond*, and made the ſaid *Alexander* Executor, who after his fathers deceaſe elected to take as Legatee, and after *Ralfe Hamond* dyed, leaving iſſue male, and making his wife executrix; *Alex.* not having iſſue male, granted the whole term by deed to B. & C. for the behoof of himſelf and his wife during their lives, and after to the uſe of his youngeſt daughter whom Sir *Robert Lenkenor* married; then *Alexander* dying without iſſue male, the wife, and Executrix of *Ralfe Hamond* entred claiming the term, and being kept out, ſealed a Leaſe, whereupon an *Eject. firmæ* was brought, and a Jury appearing at the Barre in the Exchequer, found a ſpeciall verdict

Both Alexander and Ralfe were executors; but that makes no difference.

dict in effect *Ut ſupra*. And in argument of this Caſe, firſt the main Queſtion was, Whether the Caſe were all one in Law with the former, where a term was deviſed to one for life, with remainder over, ſo as by the death of *Alexander Hamond* without iſſue male, the term ſhould goe to the next in remainder, as in the other Caſe, by the death of the Deviſee for life, dying within the terme, it ſhould doe. And on the plaintiffs part it was urged to be all one, ſo that by vertue of the bequeſts *ſupra*, *Alexander* had an eſtate to him, and his Executors only, ſo long as there ſhould be heirs males of his body; and he dying without ſuch iſſue, the term remained to the Executors of *Ralfe*, who had the remainder in like manner, & left iſſue male which ſtil lived, and ſo that ſtate of *Ralfe* yet had continuance. For it was admited by the counſel on that ſide, that the term could not goe to the iſſue male of *Ralfe*, acording to the words and intent of the Will, ſince it was impoſſible to make a term to deſcend without an act of Parliament. This therefore, they ſaid the Law ſhould work, which was neareſt to the intent, *viz.* that after *Alexanders* death it ſhoul

goe

goe first to his Executors, and assignes, so long as issue male of his body do h continue; and for want of such issue, then to *Ralfe* his Executors and assignes, so long as his issue male should last; and therefore in this case the issue male of *Alexander* failing, the Executor of *Ralfe*, whose issue male faileth not, should injoy the terme; and so judgment ought to be given for the plantiffe being Lessee of that Executor: on the other side it was said by the defendants Counsel, that this case differeth much from the other case, where the term or Land held by Lease, is given but for life to the first with remainder to another; which case as having been often resolved, was clearly admitted to be good Law; for in that case the intent of the Testator might, and did, take effect. But in this case, if the Land should goe to the Executors and assignes of *Ralfe Hammon*, it must goe against the intent or the Testator, whose minde and will was, as it appeares by his word, that it should goe only to the issue male of one Son after another, and not to any Executors. Now then, since this intent was so contrary to the rules of Law, that it could not take effect, there-

therefore it muſt be void, and ſo all the words of heires Male ſtanding void, the Will is to be conſtrued as a ſole, and abſolute gift, and bequeſt, to the ſaid *Alex.* and conſequently the term muſt goe to his Executors, and Aſſignes. And for this point, reſemblance was made to a Caſe reſolved in the Kings Bench; where a Leaſe was made by indenture to A. *Habend.* to A. B. and C. for their lives: now becauſe B, and C. could take nothing, it was reſolved that A. ſhould not have it for their lives, but for his own onely. This Caſe was ſaid to come very cloſe in reaſon to the Caſe in queſtion; for as here the intent of the Leaſe was that B. and C. ſhould be eſtated for their lievs, and, ſince that could not be, therefore the naming of them ſhould be utterly void, and as if they had not at all been named; and their lives ſhall not ſtand as a meaſure for the eſtate of A. So in the other Caſe the intent of the Will being that the Leaſe, or Land Leaſed ſhould goe to the heirs Males of the body, firſt, of *Alexander*, and after of *Ralfe*; ſince this cannot be, therefore the words, and name of heirs-males ſhould ſtand for a meere blanck and cypher, and not to mea-

Windſmore and Holford *vel* Holford in 2 . & 29 Eli. argued I and *Tr.* 29. El. adjudg.

meaſure out any ſtate to the ſaid *Alex.* & *Ralf*, and their Executors and Aſſignes. Alſo it was ſaid on the defendants part, that an eſtate for life in the judgment of Law is of ſo ſhort, and uncertain continuance, that if A. make a Leaſe to B for his life, and after makes a Leaſe of the ſame Land to C. for years, now ſhall not this latter Leaſe be void abſolutely, for any part of the term, but ſh ll ſtand in expectance of the death of B. and as ſoon as he dyeth, ſhall take effect immediately: whereas, if the Leaſe to B. had been for ten years, or any like term, then the Leaſe to C. ſhould have been void for ſo many years of his term: Thus it appears that a ſtate for life is very momentary in the judgment of Law and not reputed of any certain continuance, ſo much as for a day. But it is otherwiſe of an eſtate tayle, ſo as if A. having given Land to B. in tayle, doth after (without indenture which makes an Eſtopel) make a Leaſe to C. for 21. years, and then B. dyeth without iſſue during the term, yet ſhall not the Leaſe take effect, becauſe it was utterly void at the firſt making. For an eſtate tayle being a ſtate of inheritance, may in the intend-

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ment, and judgment of Law have continuance for ever, as appeares both by the Caſe of *Adams* and *Lambert*, where it is held within the Statute of Chanteries, which ſpeakes of gifts, to have continuance for eve : Therefore a reverſion upon an eſtate tayle is no aſſets, nor giveth cauſe of receipt, otherwiſe in all theſe Caſes it is touching a reverſion expectant upon a ſtate for life. Again it was ſaid by the defendants councel that an eſtate may be limited to A. and his heirs during the life of B. with remainder to C. as in *Chudlies* Caſe was reſolved : but if Land be given to A. and his heirs, ſo long as B. ſhall have heirs of his body or heirs males with remainder over to C. this remainder is utterly void. So as there is in the judgment of Law a great difference between the largeneſſe and continuance of an eſtate tayle, and of an eſtate for life. And if (which is worth the obſerving) a fee ſimple cannot afford a remainder to be drawn out of it after ſuch a gift to one and his heirs, during the continuance of an eſtate tayle, or of the meaſure thereof ; much leſſe can a term yield ſuch large thongs to be cut out of it, as a Remainder after an eſtate

estate to one so long as he shall have heirs of his body, or Heirs Males, which is all one. And in this case the remainder was held void by *Baldwin* and *Shelly*, though *Englefield* were of contrary opinion, as the Lord *Dyer* sheweth. Further it was said, that if such a conveyance by will should stand good, it would raise a perpetuity, not to be cut off by any recovery.

28. H. Dy. fo. 7.

But whereas the case of *Hammon* hath been related before, (so by way of admittance it was argued as a gift, and bequest to *Alex. Hammon*, and the heirs males of his body, with remainder in like manner to *Ralph.*) The truth of the case was, that the words of the Will, were onely to *Alexander*, and his Heirs Males (not speaking, of his body) and so to *Ralph*; which, as was urged by the defendants counsel, made the Case stronger against the plaintiffes: for admit that the former way, *Alexander* should have had but a state determinable upon the continuance of his issue Males, yet here not so. Since the reason why in Wils, such a devise being made, the Law should supply the words (of his body) is only to make an estate tayle to the Issues Male ac-

according to the Teſtators intent. Now in this caſe of a term for years ſo bequeathed, no eſtate tayle could poſſibly be, though theſe words had been in the will; and therefore the motive to the Law failing, no ſuch ſupply will be made by the Law, ſince it would be to no purpoſe: conſequently, here was neither ſtate taile, nor iſſues or heirs Males of the body, on whoſe continuance this ſtate of *Alexander* ſhould be determinable. Therefore it was an abſolute, and totall bequeſt of the term to *Alexander* for ever, *viz.* ſo long as the term ſhould continue: for as a bequeſt to one for ever is aſmuch as a bequeſt to him, and his heirs; ſo a bequeſt to one and his heirs, is as much as if it had been to him for ever.

And this Caſe after ſix arguments on each ſide at the Barre (if I much miſtake not) was upon argument by the Barons adjudged for the defendant, by the Lord chief Baron *Tanfeild*, and Mr. Baron *Bromley*, Mr. Baron *Denham*, (who only heard, as I take it, one argument on each ſide, made of purpoſe in reſpect of his coming into his place after the former arguments) being of the

the contrary opinion: and the judgment proceeded upon the point formerly touched, that as this case was, the state of *Alexander* did not end by his death, and remain to the Executors of *Ralph*. Other points were stirred, which will be touched upon in other divisions after, in this Chapter. It will be observed that I doe more fully expresse reasons, and points, inforced on the defendants part, then on the plaintiffs, wherefore let these two reasons be accepted. First, that I better could relate that than the other, being the first who argued for the defendant, and hearing little of that which was by others said on either side after, nor hearing the Courts, *Nec ad hoc conductus, nec pedibus fortis.* Secondly, the labour did lye on the defendants part, to prove that this Case differed from the common case of devise to one for life, with remainder to another.

We are now come to the sixth point, *viz.* That where House, or Land held by lease, or the profits thereof, or the Lease or term it self, which in a Will makes no difference, is bequeathed to A. for life, or for some part of the term with the remainder to B. and the Executor assent

fenteth that A. ſhall enjoy his bequeſt, whether this ſhall enure to B. alſo, ſince without the Executors aſſent, no legacy can take effect. And it hath been reſolved that this aſſent ſhall be effectuall, as well to all the remainders as to the firſt eſtate, and ſo according to former reſolutions, it was admitted in *Hamonds* Caſe, that *Alexander* his aſſent to take as legatee, ſuffices (if the bequeſt had been good) for the remainder to *Ralph*, and others. And the reaſon of this doubtleſſe is, becauſe here the particular eſtate, and the remainder are all but one eſtate in Law; they make but one degree in a Writ of Entry, nor ſhall have but one year and a day to enter for mortmain; And an attornment to the Grantee of a rent or reverſion for life with remainder over, doth enure alſo to the remainder, which being aſſent hath much affinity to that of the Executor, each tending to perfect the grant of another man. Now then whereas it was urged in *Hamonds* Caſe, that the ſtate limited to *Ralf* ſhould take effect, not as a remainder but as a new eſtate to commence futurely, *viz.* when *Alex.* ſhould be dead without iſſue male: if it could be admitted to be ſo, then could

Plow. 544. 2. Co. lib. 10. f. 47.

not the assent of the first state to *Alexander* have enured to this, since to R. in remainder it worketh as being one state with the first, which reason must faile the other way. This difference between a remainder, and new estate future, brings to my minde the case of a rent by way of new Creation, granted by C. out of Land to A for life, or intayle, with remainder to B. In like manner, it hath probably been held, although this limitation to B. cannot be good by way of remainder because C had no estate in the rent remaining with him when he made the grant to A. yet should it be good by way of a new grant, and creation to commence futurely. But this doubtlesse cannot so be but with a difference, for if the grant were by indenture between C. on the one part, and A, only on the other part, now B, being no party to the deed can take nothing by it, except by way of remainder, but if he were party to the indenture; or if the Grant were by deed poll, to which all men are a like parties, then it happily may enure as a future Grant to B. This is not impertinent.

Now as the Executors Assent to one cannot enure to another, though of the same

ſame thing, except by way of remainder; ſo neither can it any way where the things are not the ſame, except in very ſpeciall caſes; as if a termer bequeath a rent to A, and the Land it ſelfe to B, the executors aſſent that A. ſhould have the Rent, is no aſſent that B. ſhould have the Land; yet I thinke the aſſent that B. ſhould have the Land, doth imply the aſſent that A ſhould have the rent. For that the reſtraint impoſed by the Law, againſt the paſſing of chattell by a will without the Executors aſſent, being out of reſpect to the payment of the Teſtators debts; now if the Land ſhall paſſe to B. it is no more available to the Teſtators debts that it paſſe diſcharged of the rent, than charged. 2. Since the gift and bequeſt was of the Land charged with the rent, therefore if this bequeſt ſhall take effect, it ſhall carry the Land according to the Teſtators intent, *viz.* with this charge upon it: for what elſe doth the Executor in this, but aſſent that the will of the Teſtators herein doth ſtand and take effect, and conſequently B. muſt take the term according to the will, and not in any different or contrary manner?

1. *Plow. Com.* 521. In *Bret.* & *Rigdens* caſe So of common or other profit.

Next we are to consider of the manner of assents by Executors, which hath some affinity with the fourth point. But here we shall consider only of assents conditional. Now to this purpose we wil cast our eyes upon two sorts of conditions, *viz.* precedent and subsequent. As for the former, an Executor may to a legatee absolutely give assent upon a condition precedent, as thus: I am content, that if you can get and bring into me such a bond wherein the Testator stood bound unto I. S. that then you enter upon the term, or take the corn or cattel to you bequeathed. So of other like conditions which may precede the assent, as if you can get the assent of my Executor, or if you will pay the arrerages of rent to the lessor behind at the Testators death, or if you will pay the wages already due to the servants attending about the cattel or corn to you bequeathed. In this case, if the condition be not performed, there is no assent, & therefore the conditioning in this manner is good. But if it be on a condition subsequent as thus: I do agree that, you shall have the thing bequeathed to you, provided that you shall pay so much yeerly to me, or to such a creditor of the testa-

tor;

or; now the legatee entring into or taking the thing bequeathed, ſhall not loſe it again by failing to perform the condition afterwards; for the Executor by his aſſent cannot make that legacy conditional which the Teſtator gave abſolutly, no more then he can make the bequeſt to be abſolute which the Teſtator gave conditionally, except by a releaſe made of the condition. As in other things, ſo in this, the Executors aſſent is like to the atturnment of a leſſee, which cannot be upon a condition ſubſequent, where the grant is abſolute or without condition, though yet he may to his atturnement prefix a condition precedent.

In the eighth place we are, touching the bequeſt of leaſes or chattels real, to conſider what manner of intereſt one to whom a remainder of a term after the death of another is limited, hath, and whether he may grant the ſame or diſpoſe thereof during the life of the firſt. And as to that it is clear that he hath but a poſſibility of remainder, for that poſſibly the whole term may be ſpent in the life of the firſt, to whom, during his or her life it is bequeathed; now a meere poſſibility is not grantable. Therefore was

90. Eli. *Fulſys* caſe. it reſolved in the late Queenes time, where he in remainder granted or ſold his ſtate or intereſt to another during the time of the firſt, that this Grant was utterly void, becauſe a Poſſibility cannot be granted; but whereas ſome opinion in that caſe was delivered that this poſſibility could not be releaſed, no more than granted, it hath ſince been reſolved that he in the remainder by his deed of grant or releaſe of the deviſee for life, may make his eſtate, which before was determinable by his death, to be now abſolute, ſo as it ſhall continue to his Executors, adminiſtrators, and aſſignes, after his death during the whole term. It may be that what was conceived in the ſaid caſe of *Fulſey*, negatively of the validity of a releaſe by him in the remainder, might be meant or perhaps expreſſed of a releaſe to him in the reverſion; but ſurely (me-thinks) though he could not ſurrender, yet his releaſe or defeaſance to him in reverſion or remainder having the freehold or inheritance, ſhould diſſolve or deſtroy this term reſidue after the death of the Deviſee for life, ſo as there the freehold ſhould be diſchargd thereof. But *Que-*

Lampets caſe Co. li. 10. fo. 48.

re,

re; for I have not known this in queſtion. As for the other point of *Fulſeys* caſe, it was in the ſaid latter caſe of *Lampet* confirmed and admitted for good Law. *viz.* that this Poſſibility of remainder could not be aliened nor conveyed to a ſtranger.

Now we are come to the ninth Point, *viz.* to examine whether any act of the deviſee for life can fruſtrate or defeat him in the remainder of the term, and whether by the act of God, *viz.* the death of him in the remainder before the firſt deviſee for life, ſhall defeat it. As to the firſt, it hath divers times been reſolved, that no grant made by the firſt man, can cut off or defeat the ſecond, though formerly it were held otherwiſe; but according to the late reſolution was it alſo held or admitted by all in the ſaid caſe of *Hammond* where was ſuch a grant. And as this cannot be done by any direct grant or alienation, no more can it by an indirect, or implyed, as by taking of a new leaſe, which is a ſurrender in Law of the old leaſe, no more than by an expreſſe Surrender. Nor doubtleſſe by outlawry, whereby the terme of the firſt Deviſee is ſetled in the Crown. But

9, *Point.*

Plowd. 320. *Welden* and *Elkington* 10 Eliz. 11. 2. 7. 19. Eli. D. 250. *Con.* 8 L. D. 253. & 33 H. 8. *Br.* Chatels 23.

if we put the case further, of waste commited by the tenant for life, or breach of condition by not payment of the rent, or otherwise; these for the whole in the latter case, and for the part wasted in the former, doe so destroy the lease, and put the reversion in *Statu quo prius*, as that all remainders must needs faile: so of a feoffment or other like forfeiture by fine. As for the death of him in remainder, it was urged in the case of *Hamond*, that since it was but a meer possibility, if it could not take effect, and become an estate in the life of him to whom it was limited, it could not settle in his Executor; and to that purpose were cited the case of the Rector of *Chedington*, and more expressly as resolved in the point the case of *Price* and *Atmore*. But the Court resolved (and found former Resolutions in other Courts that way) that the death of him in remainder did not hinder, but that it may settle as well in the Executors upon the death of the devisee, as it should have done in himself, if he had overlived the first devisee for life. If the lessor enter and levie a fine, and the devisee for life enters not, nor claimes in five years, he in the remainder

Welch den & Ek. ubi supra But there the point was never questioned, though suce deate was there

der

der may enter, as having a right futurely accrued.

In the laſt place we intermedled only with leaſes bequeathed, wherein yet is to be underſtood, that what thereof is ſpoken, is to be extended to, and underſtood of all other chattels real, as wardſhip of body & lands, eſtates by extent upon ſtatutes or judgments, terms otherwiſe than by leaſe, in fairs, markets, rents, annuities, commons, advowſons, and other profits; yea, one ſingle next avoidance of a church. Now we come to conſider of bequeſts perſonal, principally, if not only; *viz.* how ſuch may be forfeited, loſt, or revoked. Firſt then, we will conſider of the acts of the legatee; Secondly, of the acts of God; Thirdly, of the acts of the Teſtator. The legatee, as from the Civilians I learn, may forfeit his legacy by his miſ-carriage towards the Will: as if he uſe meanes to have it concealed and kept from being known, and conſequently proved. So if he accuſe it of faliſitie. So againe, if he deface or deſtroy the Will, Alſo, if being by the Will appointed to be tutor or educator of a child, he refuſeth ſo to be; ſo ſaith Maſter *Swinborn*: but *Silveſter Prierius* ſeemes

10. *Point.*

Of forfeiture, revocation and ouer loſſe of legacie.

Swinb de teſtam. 352. 3. 3. except as tutor or guardian he accuſe it

Sum. Silv. 283. seems to me oppoſite in that where he ſaith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non eſt conditionale, ſed modale*; ſo as he takes away the force of a condition from words conditionall, whereas the other without words conditionall raiſeth a condition implyed. Laſtly, if the legatee preſume too farre upon the ſtrength of the Bequeſt to him, ſo as he taketh the thing bequeathed without the conſent of the Executor; thus alſo doth he forfeit his legacie, ſaith Maſter *Swinborne*, unleſſe the Teſtator did will and appoint he ſhould ſo doe. The falling into enmity with the Teſtator, will be conſidered of more fitly, as I take it, among the acts of the Teſtator. In the next place, let us ſee what acts of God, ſhall cauſe a legacy not to take effect; firſt thus, If the legatee dye before the Teſtator, this legacy is loſt, and his Executor ſhall not have it: So alſo ſaith Maſter *Swinborne*, if it be appointed to be paid after the death of the Executor, and the Legatee dyeth before the Executor, it is loſt; and ſo alſo if he dye before the condition performed, ſaith he; Let us come now to Time of payment, and death before

De Teſtam. 252.

De Teſtam. 255.

before it. If there be a day certain limited for payment, and the Legatee dye before that day, his Executor ſhall have the Legacy; contrariwiſe, if the payment were limited to be made when the Legatee ſhould be married: but if it were only expreſſed to be towards the marriage of the Legatee, and ſhe dye before marriage, her Executor ſhall have it, ſaith *Swinborne*. Now put the caſe that a legacy is bequeathed to B. to be paid when he ſhall be five and twenty years old, and B. dyeth before that age; it ſhall now be payed to the Executor, and that preſently without ſtaying till B. ſhould have been of that age, ſaith *Prior*. Nay, ſaith *Swinborne*, if the words of the Will be ſo, *viz.* when he ſhall come to ſuch an age, then if he dye before, his Executors ſhall not have it at all: but if the bequeſt be generall, and further it is added in the Will, that the Teſtator ſhould have that Legacy paid the Legatee at ſuch an age there, though he die before ſuch an age, yet his Executors ſhall have the ſumme bequeathed. The difference may ſeem very nice, yet happily it wants not ſome probable colour of reaſon. Now laſtly let us come

Vide Bro. Deviſe 27. and 45. There were divers dayes of payment, & the deviſee dyed before the laſt; his exeſh l have it 14 vel 2. H. 6. 3. H. 8. & 3 El. Dy. 59. See this difference.

Sum. Silv. 283. According hereto; vide *Dy. ubi ſupra, per majorem opinionem Juſticiar.*

Acts of the Teſtator.

to

to the Teſtators own act, who clearely hath power to revoke or countermand any legacy, though he revoke not the reſt of the Will; and here firſt of Revocation preſumed. If there fall out *Graves inimicitiæ inter legantem & legatarium, legatũ caducũ efficitur*, ſaith the Summiſt; *Sed non propter leves*, ſaith he: *et ſi graves, ſi tamen redeant ad amicitiam, reintegratur legatum*; that is, by grievous enmity after ariſing, and never reconciled between the Teſtator and legatee, the legacy is diſſolved; otherwiſe, of a light breach, or falling out, though it continue until the death of the Teſtator. This I conceive to be rather fit for this place, as an act of the Teſtator, than to be rekoned or regiſtred amongſt the acts or forfeitures of the legatee, for that it is not by the Summiſt made material, or any point of difference, whether the legatee gave juſt cauſe of offence, or that the Teſtator unjuſtly conceived diſpleaſure, and ſo grew into cauſleſſe enmity Therefore alſo doe I hold it of the nature of a revocation implyed or preſumed, for that although no revocation be made, yet ſince the Teſtator hath ceaſed to bear good will to the legatee, he cannot be intended to will him good,

Sum. Silv. 255.

nor

nor consequently to be of the same mind, touching the benifitting of him, as he was when he made his Will; yet here again, it is worth the consideration, whether the circumstance following may not make a difference in the case thus: That where the Testator dyeth shortly after the breach and enmity grown, and before he come to the place where his Will is, or at least to opportunity of perusing and reforming the same, there this very alteration of affection should make an alteration in the Will, and a revocation of the amicable bequest. But where he living a good space after, and coming to the place where his Will was, and specially if he doe again peruse it, and yet doth not crosse nor expunge that bequest, here it may be presumed that either his anmity ceased, or that so farre as to continue this bequest, the charity or other motives inducing him to make it, stood unvanished and not extinguished by this breach of former amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative Will, without reducing it to writing, and causing it to be attested by witnesse, though the Testator live divers yeates after,

after, doth ſtrongly argue his intent not to continue, that what was done in an extremity ſhould ſtand as his Will: ſo on the contrary, the permitting of a bequeſt expreſſed in a written Will, to continue without any croſſing, blotting, or defacing, may argue, againſt contrary preſumption, the Teſtators minde, that it ſhould continue as part of his Will. But now let us conſider of more expreſſe revocation, and to that purpoſe will I relate a late decree in the Chancery, made by the Lord Keeper, according to the opinion of the Maſter of the Rolls, three Judges, and two Doctors, Maſters of the Court; Between *Robert Eyre* and *Williom Eyre* complainants, and *Heſter* late wife of *Chriſtopher Eyre* their brother, and now wife of Sir *Francis Wortley*, Defendant; Thus was the caſe; The ſaid *Chriſtopher Eyre* 15 *Jacobi*, by his laſt Will and Teſtament giveth and bequeatheth to the ſaid *Robert Eyre*, his brother, an hundred pounds, and to the ſaid *William*, his brother, a thouſand pounds, and gives to the ſaid *Heſter* his wife all the reſidue of his eſtate, and makes and ordaines the ſaid *Heſter* his ſole and only executrix, ſaving for the

per-

performance of his Will, orders *Robert Eyre* and *William Eyre*, his ſaid brothers, whom he intreats to joyne as Executors in truſt with his wife, for the better performance of this his laſt Will. Afterwards, *Jan* 5. 1624. being ſick of the ſickneſſe whereof he dyed, he was moved by Maſter *Damport*, and Maſter *Stone*, to ſettle his eſtate; to which motion he yielded, and Maſter *Stone*, and Maſter *Damport* did demand of the ſaid *Chriſtopher*, what friend he thought fitteſt to be his Executor, and to whom he would commit the care of diſcharging his funerals, and performing his Will, whether he truſted any perſon more then his wife, to be his Executor? To whom he anſwered, That his wife was the fitteſt perſon for that purpoſe, and therefore ſhould be his ſole Executrix, and then the Teſtator was moued by Mr. *Stone* to give and bequeath Legacies to his father, to his brethren, and to his kindred; whereupon he anſwered he would give or leave them nothing, and being further put in mind to remember his friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty ſhillings; and being

there-

thereupon moved by his wife to give his ſaid Godſon more, or a greater legacy, or the like in effect; ſaid, Thou knoweſt not what thou doeſt, doe not wrong thy ſelf; twenty ſhillings, or thirty ſhillings is mony in a poor bodies purſe, or the like in effect; and the reſt, he left them to his wives diſcretion or diſpoſition, and the ſaid Teſtator did ſpeake the words aforeſaid, or the like in effect, *Animo teſtandi & ultimam voluntatem declarandi*, as the witneſſes then preſent did conceive.

Ord. 27. Jun. a. 2. Caroli Regis.

This Will was proved by the oath of the ſaid *Heſter*, and this *Codicill* being pleaded as a revocation of the ſaid bequeſts: The ſaid Maſter of the Rolls, Judges, and Doctors were by the Lord Keeper, and the Order of the Court deſired to reduce the matter upon the Will and *Codicill* into a caſe, and to certifie their opinons, whether the ſaid *Codicill* were a revocation of the legacies given to the plantiffes, or nor. And they, after counſel heard at ſeveral times, *viz.* both common Lawyers, and Civilians, and many hours ſpent in conference together, did finally reſolve with one unanimous conſent, that the legacies to the plaintiffes given

given, were not by the ſaid *Codicell* revoked, and ſo certified under their hands; upon reading whereof, *November* 25. decree being reſolved to be made, if cauſe were not ſhewen to the contrary *Novem.* 27. on which day, the Defendants Councel, before the Lord Keeper, in the preſence of the Maſter of the Rolls, and the ſaid three Judges, and Sir *John Heyward*, alledging what they could in ſtay of the ſaid Decree: It was by a general concurrence of opinion decreed, that the legacies, given to the ſaid Plaintiffs, ſhould be to them payd on our Lady Even, with twenty Nobles in the hundred, for the detainment thereof.

This caſe I thought fit to relate ſomewhat at large, becauſe it pitcheth upon the point of revocation, without plain, full, and expreſs termes. And ſurely, as Wills are to be made out of diſpoſing memories, & underſtandings; ſo alſo with deliberate, & adviſed judgments; & therefore by like reaſon not to be countermanded, or revoked by ſick, or ſleight expreſſions. And this ſeems to me very agreeable with the rule, and reaſon of the common Law. For as reaſon it ſelf doth dictate, that *Nihil tam conſentaneum eſt æquitati*

quitati naturali, quam unumquodque diſſolvi eodem modo quo conficitur; So hath the common Law of *England*, in my underſtanding, reſolved; as for the purpoſe, If the King preſent a Clerke to a Church, and he is thereupon admitted, and inſtituted thereunto. Now yet before induction may this be revoked as a Will may. Yet if the King ſhall after, and before induction, preſent another man to this Church, without an expreſs repeal or countermand of the former preſentation, it ſhall not hereby be revoked. So if Lands were conveyed to certain uſes, with a clauſe or power of revocation; the ſale of the ſame to another, did not revoke the former. But if a ſtate were meerly at will, then the conveyance to another by the common Law, amounted to a revocation. Therefore was the Statute made *tempore Henrici* 8. to redreſs this, *viz.* that where the King had granted Lands, or other things, to one during his pleaſure, this ſhould not be revoked by a grant to another, without recital of the former, and Declaration, that the King had determined his pleaſure.

To help this was the Stat. made 27 *El.* cap. 4.

6 *H.* 8. ca. 9.

11 *Point.* Being now to conſider of relation in the

the Executors aſſent, it is meet, that ſince theſe diſcourſes are principally intended, for thoſe who are not grounded Students in, or profeſſors of the Law, that we ſhew what we mean by relation, or what it is in Law. Thus therefore be it conceived, that relation is a kind of fiction in Law, making a thing done at one time to be accepted, and reputed, or to have its operation, as if it had been done at another time paſt. As for the purpoſe, *A* doth bargain, and ſell freehold Lands to *B*, in *Auguſt* by Indenture, which is not inrolled till *Octob.* following; yet this hath ſuch relation to the date of the Indenture, that if *A* after that, and before the inrolment, become bound in a Statute, or granted a Rentcharge, or made a Leaſe for years, or took a Wife, or committed Felony; yet ſhall none of theſe be of any force to charge or prejudice the ſtate of *B*, for that the Law adjudgeth him now owner by relation, as from the time of the date: yea, if a ſervant departing in *Auguſt*, for ſome great breach with his Maſter, do kill his Maſter in *October*, this is in Law petty Treaſon, as if he had continued ſervant, when he did the fact, becauſe

it relates to the malice conceived, when he was his servant. Now then having shewed that a terme or other chattel real, or personal, passeth not, nor is transferred in property to the Devisee, untill the assent of the Exec: be thereunto had; we now put the case, that this assent is not had till a year, or some such good space, after the testators death, and make our question, whether this shall have relation to the testators death, *viz.* to be in the Laws account, as if it had then been. Or perhaps, to some purposes so to stand, and to others not so. That this is useful, and material to be known, be it thus shewed. One bequeatheth his term of tithes of an advowson of an house or Land by him first leased, to an under Tenant for Rent, and dyeth in *May*, the Exec: assenteth to the bequest in *October*, between which two times tithes be set out, the Church becometh void, rent groweth payable; now if this assent shall relate to the Testators death, the Devisee shall have these, else not; the like Cases may be put of the brood of Cowes, Mares, and Ewes, fallen between the death of the Testator, and the assent; so also of fleeces of sheep shorn, *&c.*

Now

Now to come to the point, it is reported by the Lord *Coke*, to have been held in the late Queens time, that this assent shall, as between the Exec: and the Legatee, have relation to the Testators death, yet so, th t if the Executor before his assent to the Devisee of a Lease, committed wast, now the action of Wast shall be brought against the Executor, in the *Tenuit* for the wast done before, and not against the Devisee in the *Tenet*.

Tr. 41 Eliz. Co. l. 5. 12. B. Sanders Case. Vide Plow. com. of Executors against a stranger for taking before assent. 280. b.

But put the Case that the Legatee, before the Executors assent, gr nted the term to *I. S.* now if to any purpose, this assent shall have relation, it shall certainly so be to make good this grant, as making the Legatee to be estated; and consequently, able to grant before the Executors assent: yet do I not find any opinion or resolution in the Point; but find it debated at the Bar in the late Queens time, between *Puckering* and *Egerton*, in the Case of Administration granted to *A.* after her Grant of a free term, left by her intestate Husband; but I find no resolution therein, nor perhaps, wants there material differe ce betwixt that Case, and the other:

P. 25 Eliz.

for there the Deviſee had at leaſt an inception of title by gift of the owner, wanting only a circumſtance of aſſent to perfect it; but here this Woman, till adminiſtration had not ſo; unleſs perhaps, the Stat. 21 of King *Henry* the 8th, directing or enjoyning Ordinaries to grant adminiſtration, ſhall amount to a kind of title *ad rem*, though not yet *in re*. But to return to the Point of aſſets; where a reverſion is granted by deed or fine, if the Leſſee a good time after do attorn, this ſhall have no relation to the time of the grant: So as for waſt committed, or rent grown due between the grant and attornment, the Grantee can have no remedy. Therefore it is good for him who buyeth, or hath any thing of the gift of a Legatee, to have the aſſent of the Executor, before the ſale or gift, well teſtified; or if the aſſent be not had till after, let him take a new gift, that he may not reſt in a doubtfull caſe; for beſides the premiſes, that great legiſt. Sir *Edward Cooke*, when he was a practiſer (to Mr. *Stubbes* of *Norfolke*, for his fee) gave his opinion, as I have been confidently informed, that where a Leſſee for years, being outlawed, did grant his term, and after reverſed

48 E. 3. 15.

the

the Outlawry, this did not make good the grant by relation, it not being in the Grantor at the time of his grant: and this hath much affinity with the principal point; for there, if the relation help not, the Grant is not good from the Legatee.

Divers Cases of bequests, considered and expounded.

IF a termor of an House, bequeath his House to *B*, without expressing how long he should have it, he shall have the whole terme, and number of years. So, of Land. 14 *Eliz. Dy.* 307. cont. in a grant. 31 *Eliz.*

Also of the name of the House, the Orchards, Gardens, and Backsides, do passe: yet, if the House with the Appurtenances be bequeathed, thereby the Lands belonging to the House, or used with it, do passe, though yet they would not so do, by such words in any Lease, Deed, or Grant; yet by some *Civilians*, or *Canonists*, the Orchard belonging to an House, shall not passe by the onely gift of the House, without some words, shewing the intent of the Testator so to *Sum: Silv:* 286.

be; or except one gate or door lead as wel to the Orchard, as to the houſe; but ſome other of them hold, that it doth paſſe without any ſuch help of circumſtance, ſo as it be adjoyning to the houſe.

If a Leſſee for years give his term by his Will to *A.* he ſhall have it without paying any Rent, for the Executors ſhall pay it for him, as I find in the Summiſt, but againſt reaſon, me thinks.

Ibid. ut ſup. If one bequeath his Indenture of Leaſe, his whole ſtate in that Leaſe paſſeth. So if one bequeath his Obligation, or other ſpecialty, the debt or duty it ſelf, ſhall go to the Legatee; and by the Canon, or Civil Law, the very action it ſelf paſſeth, *viz.* as I conceive, ability to ſue the debtor in his own name; but in our Law it is otherwiſe, the ſuit muſt be in the Executors name, for a debt or thing in action, cannot be aſſigned, except by, or to the King; and only at the common Law is the debt recoverable; but the Spiritual Court may force the Executor to ſue, or let his name be uſed in the Suit, for, and by the Legatee.

Ibid. ut ſup.

Yet 48 E. 3. 12. 15. It is admitted, that ſuch a Deviſee of all goods after debt payd, ſhall have a duty reſting in account.

If one bequeath all his moveables, Debts due to him are not bequeathed, nor Corn, nor Fruit growing on the ground,

ground, nor ſtone, nor Timber prepared for building, as the *Canoniſts* and *Civilians* hold.

On the other ſide, if one bequeath the moyety of all his goods, the Legatee ſhall have only the moyety of that which remains after debts payed, for that only is to be accounted the teſtators which he hath *ultra as alienum.*

By a bequeſt of all Utenſils or Houſhold-ſtuff, Plate nor Jewels, are not given. *Que.* 36 H. 8. *Dy.* 59. *Dy. Ibid. ſupra, Sum Silv.* 286.

If one bequeath to his Wife all her Apparel, ſhe ſhall not have, as ſome *Civilians* ſay, her Ornaments of gold or ſilver; by which is meant, as I take it, Chains, Jewels, Bracelets, Rings, *&c.* but others are of contrary opinion, except they be ſuch things as are not lawful for her to wear.

If a Bed be given by a Will, *Venit ornamentum ejus*, ſaith the *Civilian*; that is, the furniture thereof paſſeth, *viz.* not only the Bed, Bedſteed, Bedcloaths; but alſo the Curtains and Valens, as I take it. But I think, that by gift of a Coach by will, the Coach-horſes paſſe not; yet perhaps, the furniture of the Coach-horſes may paſſe as appurtenant to the Coach; for ſo I think they ſhall do, rather then by bequeſt of the Coach-horſes without the Coach. *Ibid.*

If

Ibid. If one bequeath to *A.* meat, drink, and cloathing, or *alimenta*; he ſhall have, ſaith the Civil Law, alſo lodging, habitation, and all things neceſſary for the maintenance of life, *viz.* as I take it, fire and waſhing, *&c.*

Ibid. b. If one bequeath to his Daughter ten pounds a year for her apparelling, and ſhe demandeth none in four years, now ſhall ſhe not after that time, have the arrerages of this ten pounds by year for the time paſſed.

Ibid. If a man bequeath one of his Horſes or Cowes, not naming which, to *I. S.* he is to chuſe which he will, ſo it be not the beſt of all, ſaith the Civil Law, and perhaps the mention of that exception grows out of reſpect to the harriot, which the Lord ſhould have, or the mortuary which the Parſon ſhould have.

Ibid. A man bequeathed thirty pieces of twenty ſhillings to *A*, twenty to *B*, and ten to *C*, to be had in ſuch a Cheſt or Casket, and it is found after his death, that there be but thirty in all, in all that casket or box, now each ſhall be abated ratably, ſaith my Summiſt, ſo as *A* ſhall have fifteen, *B* ten, and *C* five; and this ſtands with good reaſon and juſtice; for ſo

ſo each hath a proportionable part. And it were reaſonable, that it were by Parliament eſtabliſhed for Law, that all, both Legatees and Creditors, ſhould be payd in like proportion, where the ſtate will not ſuffice for full payment of each, rather then that an Exec. ſhould have power to pay one all, and another nothing: yet if the teſtator left ſufficient to make good all thoſe ſixty pieces bequeathed, *Quære*, If that which is wanting in the casket, ſhall not be ſupplied and made up; for if the Caſes following found with the ſame Authour, be good Law, it ſhould ſeem ſo to be.

If one, ſaith he, bequeatheth to *I. S.* that which is another mans, and whereto the Teſtator hath no right, then ought his Executor to buy it, and give it to the Legatee, or elſe ſatisfie him to the full value, and this not only by the Civill, but alſo by the Cannon Law, and in *foro conſcientiæ*, ſaith my Authour. *Sum. Silv.* 286.

Again, If *A* bequeath to *B*, ſuch an Horſe by name, and after ſell away that Horſe, and dyeth, now is his Executor bound to anſwer the value thereof to *B*; and if the Teſtator after his ſale of that Horſe, had bought another, and called him *Ibid.* 287.

him by the ſame name as the firſt, now ſhall this latter horſe paſſe to *B*, ſaith the Book, except it can be proved, that the teſtator ſold the former horſe of purpoſe, to revoke his Will touching that bequeſt.

Ibid. 286. So again I find, that if one having but a moyety, or one half of Green cloſe, or of a ſtack of Corn, or other Chattel, doth give the whole, ſo as the words be apparent to reach to more than his moyety, then muſt the Execut: buy out the others part for the Legatee, or give him the value; but if the words be but general, ſo as they may be reaſonably ſatisfied with the Teſtators part, no ſupply ſhall be made. So alſo, if one having goods in pledge, bequeath them, it ſhall be conſtrued to extend no further than his right.

Ibid. 285. a A bequeſt is made of an hundred pound to be payd at a future time, *viz.* divers years after the teſtators death; a queſtion is made by the Summiſt, whether the profit of the money in the mean time, ſhall go to the Legatee, or the Executor; and he reſolves with this difference, if the day were given in favour of the Legatee being an Infant, who could no ſafely receive it any ſooner, then he ſhall have the profit; but if the reſpite of payment were

were in favour of the Exec: then ſhall the Lega ee have but he bare ſum, without any addition of mean profi s.

If one bequeath all his term or goods to his Exec: for payment of his deb s, or deb s and Legacies, it is a void bequeſt, becauſe i is no more than the Law would ſay, if he had ſ id no hing. So if it be gener lly to perform his will. *15 Eliz. Dy. 331.* *Plow. Com. 545. b.*

If one ſeized in fee-ſimple of Land, beque h it o his Exec: to pay deb s, the Exec: hath no ſtate of Free-hold; for if he ſhould, hen it muſt be either for life, which might end by his quick death before debts payed: or in Fee-ſimple, which would carry away the Land for ever from he Heir, where perhaps a few years profi s might ſuffice to ſatisfie the deb s; ye , then by dea h of the Exec: the L nd ſhould deſcend to his Heir, and not go to his Executor, who would be Exec: of the firſt teſtator. *Co. lib. 8. 96. a.*

If one give, or grant all his goods, having le ſes for ye rs, as wel as moveables, the leaſes ſhall not paſſe, as was held in the time of K. *Edward* the ſixth. And ſo alſo was it admitted in *Portmans* Caſe, for the word *Bona*, comprehendeth onely moveables by the better opinion there. By deed or word in life. *4 E. 6. Bro. Done, &c. 43 Tr. 37. El. in ba. reg. Portman, ver. Simmes,* or *Wills*, divers times argued.

But

But the point in that case was pertinent to this place, *viz.* a bequest in a Will of all the Testators goods; and whether thereby a Lease for years passeth or not, was divers times debated, but not resolved, the Judges differing in opinion in that point; but in another point which made an end of the Case, all agreed. Yet the better opinion was, as I find in my report, that a Lease would passe by such words in a Will, though not in a Deed or Grant by word otherwise made; for the Legacies are demandable in the Spiritual Court, where *Bona & catalla* are taken for all one. See also the Stat. of *Marlbr.* cap. 28. giving an action to the successor, *Ad repetenda bona prædeceſſ.* Yet an *eject. custod.* hath been maintained thereupon: so also upon the Stat. of Executors, *de bonis asportatis in vitâ testatoris*, hath it been resolved, and where administration is granted, it is only *omnium bonorum*, without speaking of chattels; yet hath the administrator interest in Leases, as well as moveables. On the other side, the Stat. *de prærog. reg.* mentioning only forfeiture *de catallis*, is clearly extended to moveables: so also in the Writ of assize, *De catallis quæ in eo capta fuerint*, and in the Writ

4 E. 3. c. 7. So the Stat. 5. R. 2. ca. of forfeiture of goods by those who go beyond the Sea, Ca. 16. In all these goods are comprehended.

of

of Execution upon a Stat. there is only the word *Catalla*, and not *Bona*; and in the Case reported by *Kelway temp. Henry* the 7th, it seems, *bona & catalla*, were taken for *Synonyma*, or all one. It doth not appear that these Statutes and Writs, were alledged or considered of *temp. Edw. 6.* but in *Portmans* Case the most of them were. 11 H. 7. Kelw. rep. 35. a.

If one will that his Wife, or any other, shall have, or hold, or enjoy the moyety of his Lease with his Exec. This implyeth not, that the Exec. have the other moyety as a Legacy also, but otherwise as the Law casts it upon him, no more than where the moyety of Fee-simple Land is devised to the younger Son, this shall not make the elder Son to have the other moyety, otherwise than by descent, as between *Low* and *Carter* was conceived. But there being a Proviso in the wives bequest, that if she married from the house, then, *&c. Popham*, cap. Justice, held, that if she married at all, this was a marrying from the house; for she was no longer Widow of that house, though she married with one of that kindred, and who had no other house, but would dwell in the bequeathed. *Low & Carts* Case, Tr. 37. *El.* in b. *reg.*

CHAP.

CHAP. XX.

Of the Executor of an Executor.

I Should be taxed of omiſſion, if I ſhould not ſhew whether the things foreſpoken of Executors immediate, extend alſo to the mediate, or more remote Executors. Aſſuredly, were I not by the Books o herwiſe informed, I ſhould think it ſomewhat ſtrange, that the mediate Executor in the fourth, fifth, or further degree, ſhould not by the rules of the Common Law, ſtand in like plight Executor to the firſt Teſta or, as the firſt and immediate Executor, as well as the Heir, and Aſſignee in the third, or thirteenth degree, is capable of all advantages in like for, as he firſt and immediate Heir, and Aſſignee. And indeed, we find both in the time of *Edward* the ſecond, and *Edward* the third, Execution ſued out upon a Judgment and Statute, by an Executor of an Executor, and why he might not as well maintain an action of Debt, *&c.* I ſee not. But

See *Plow.* 184. a debt againſt the Executor of an Executor.

19 *Ed.* 2. and 14 *Ed.* 3. *Fit.* Executor 87. & 103.

I must confess, I find both Books to the contrary before any Statute made in the point, and after an act of Parliament to enable them to bring Actions, and to make them subject to Actions, yet the Stat. speaks nothing of conferring upon them the Testators goods. Now if they had title to them before that Statute, and without the help of that Statute, it is strange, if they should not be suable for debts. But since that Statute, and at this day where by a Will, a special trust is recommended to an Executor, as to sell Land, *&c.* this not performed in his life time, shall not be performable by his Executor: contrariwise of an interest, as to take the profits of Lands for certain years towards payment of debts, and Legacies: and where the Stat. *temp. H.* 8. gives remedy to Executors for recovery of Rents of Inheritance behind in the Testators life, I doubt not but Executors of Executors, are within the equity, as well as within the Stat. 9 *Ed.* 3. *cap.* 3. that the Executor who appeares at the grand distress shall answer alone. Yet the Stat. *Westm.* 2. *cap.* 23. for Executors, was taken not to extend to Executors of Executors. *Quod non est lex.* So as now in all Cases, except

11 *Ed.* 5. & 13 *Ed.* 3. *Fitzh.* 1x. c. 7. 2. 25 *Ed.* 3. c. 5.

19 *H* 8. 9, 10 4 *El. Ly.* 201 32 *H.* 8. *cap.* 37. 5. 32 *H.* 8. 28 Cases. And 32 *H.* 8. *cap.* 1. Conditions, and 13 *El. cap.* 5. & 27 *El. cap.* 4. Of fraudulent Conveyances. 21 *H.* 6. *cap.* 15. for falsifying Recoveries.

39 *H* 6. 45. 7 *E* 3. 61.

of ſpecial truſt or authority, without the office of Executorſhip. The Executor of an Executor, how far ſoever in degree remote, ſtands as to the points both of Being, Having, and Doing, in the ſame ſtate nd plight, as the firſt and immediate Executor.

CHAP. XXI.

Touching Adminiſtrators.

OF theſe alſo, as ſtanding in much affinity with Executors, it may be by ſome expected that I ſhould have treated. But firſt, my excuſe is, that theſe of Executors onely, having grown to ſo great a bulk above expectation, I was unwilling to inlarge it further. Secondly, that which in the points of having, and doing, is before ſet forth, and ſhewed touching Executors, may be applyed to, and underſtood of Adminiſtrators, though not what is ſpoken of being, and un-being, or revocation of Executorſhips, and other circumſtantial points.

Laſtly, I may perhaps, if theſe find good acceptance, add ere long that which ap-

appertaineth to Administrators distinguished from Executors, or wherein they stand in different state.

CHAP. XXII.

Considerations in Conscience, touching payment of Debts, Legacies, and the preferring, or respect of persons.

TO the Advertisement, what course Executors are to hold in their payments, I thought good to add this in *foro conscientiæ*, That when as it shall stand in the Executors Will and Election, to pay whom he will, and as he will, in respect of equality in the dignity and degree of the debts, all being for the purpose by the specialty, and none of Record, and yet he hath not wherewith to pay, or satisfie all; Here he may have three wayes or courses in his eye.

First, where there is equality in the honesty and conscience of the debts; there (except in the ability of the parties to bear losse, the disproportion may otherwise occasion) me-thinks it should be most honest and just, to pay every one proportio-

nably, and to let the losse of every one to be equal; and the justness of this is taught by the Law, which gives the *Audita querela*, for equal contribution in bearing of losse by them who stand in equal degree: so of Legacies.

2 The poverty and inability of some, and the plenty of others, may in *foro conscientiæ*, justifie the paying more to one, and suffering him to lose lesse (if any thing) than another. For if the Widows mite was a greater gift, so a greater losse than more out of abundance. Where Charity findes, or may finde place or nearness to place of giving, it may find greater motives of preserving from losse: so of Legacies.

3 The nature of the debts, and so sometimes of Legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one than another, rate for rate, and so to suffer one to lose more than another. One debt may perhaps be use for money, or at least money lent for use, another may be money freely lent. Another debt for Land of Inheritance bought; another debt for a Lease, Chattels or moveables, come to the Executor. The first merits the least respect, next the second, then the third,

and

and the laſt the moſt; but where without any of theſe motives, there is not equality held in the payment, *Peccatur* (as I think) *in conſcientiam.* But let every one ſtand or fall by, or to his own, or to him who is greater than his Conſcience. This equality Saint *Paul* in another Caſe, recommends to the *Corinthians.* And *Solomon*, whileſt no inequality appeared in the point of right, ſhewed his diſpoſition to have made an equal diviſion of the Child between the Mothers, who were joynt claymers and competitors for it. 2 Cor. 9. 13.

See more of Conſcience, *Doct.* and *Stud.*

FINIS.

Sayer
8/11/11